

SUPREME COURT OF NOVA SCOTIA

Citation: MacDonald v. MacDonald Estate, 2009 NSSC 323

Date: 20090911

Docket: Hfx No. 308492

Probate File: 57303

Registry: Halifax

Between:

Marguerite MacDonald

Applicant

v.

Estate of Jean Pringle MacDonald

Defendant

Judge: Chief Justice Joseph P. Kennedy

Heard: June 23, 2009, in Halifax, Nova Scotia

Oral Decision: September 11, 2009

Written Decision: November 2, 2009

Counsel: Stephen Kent, for the applicant
Helen Foote, for the defendant

By the Court:

[1] We are here for a decision in the matter of the MacDonald Estate. The issue is whether to grant proof in solemn form.

[2] This is an application for proof in solemn form of a purported - a document that purports to be the will of Jean Pringle MacDonald. That document was dated March 26th, 2006 - I guess dated the 26th - I think the witnesses signed on the 29th of March, 2006.

[3] Jean Pringle MacDonald died on August 29th, 2008. She had been predeceased by her husband. There were no children of the marriage. On December 15, 1994, the testatrix, Jean Pringle MacDonald, had executed a will, which was prepared by a lawyer, and that will named various siblings and nieces and nephews as beneficiaries. There is no dispute that this will at the time it was executed - December 15th, 1994 - was a valid will under the existing legislation and properly executed pursuant to the *Wills Act* of 1989. So the deceased, Jean MacDonald, had a properly executed will in 1994.

[4] However, in March of 2006, again the 25th of March 2006, or the 29th, she, the testatrix, attempted to make a new will. She did so by preparing a document in her own handwriting. The holograph document - this is the document that is the subject of this application.

[5] Both of those documents, both the original 1994 will and the handwritten document of 2006, both of those documents named a niece of the deceased, Marguerite MacDonald, as the executrix. She is the applicant herein.

[6] That handwritten document of March 2006 suffers from two defects in its form of execution which would have traditionally precluded it - prevented it - from being proved as a will in Nova Scotia. Although it was written in its entirety by the testatrix herself and everybody agrees that that is the case, although it begins with the recital that it is the last will of Jean Pringle MacDonald, she did not sign the document at the bottom of the second page of the document - the last page of the document. In fact, she didn't sign it anywhere. She did write her name in the first paragraph - wrote her name in the first paragraph - but she didn't sign it.

[7] Secondly, although the testatrix, Jean MacDonald, went to the trouble of arranging for two people to sign as witnesses - she knew that she needed witnesses - they in fact signed not in each other's presence, but at different times on the 29th day of March, 2006. They were not together when they signed. They, in fact, did not witness anything. The witnesses say through affidavit that while Jean MacDonald did not sign in their presence though, she did acknowledge - she did state to each of them - that the document was her will and asked them to sign as witnesses.

[8] So it seems to me it's clear that Ms. MacDonald at that time, the deceased at that time, was trying to accomplish a will.

[9] The Registrar of Probate declined to issue a grant of probate in common form in relation to this handwritten document because of the defects in its execution, and now the executrix, Marguerite MacDonald, therefore, as a result of the Registrar's decision applies to this Court to have the handwritten document of March 2006 declared to be the last will of Jean Pringle MacDonald on the basis that it sets out her last testamentary intentions. Opposed is one John Campbell who objects to the probate of the handwritten will and he is a beneficiary under the 1994 will.

[10] Question - does that handwritten will dated March 25th, 2006 constitute a valid last will and testament of Jean Pringle MacDonald. More specifically, and I will elaborate shortly, the issue is do ss. 6 and 8 of the *Wills Act* of 2006 operate retroactively or retrospectively.

[11] Speak to the law. At the time of the making of the document in March of 2006, the provisions governing the execution of a will in Nova Scotia were those under the *Wills Act* of 1989, the relevant sections as follows. As to form and mode of execution - formalities of execution - s. 6, again I'm speaking of the *Wills Act* of 1989, s. 6:

6 (1) No will is valid unless it is in writing and executed in manner hereinafter mentioned:

(a) it shall be signed at the end or foot thereof by the testator or by some other person in the testator's presence and by the testator's direction;

(b) such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(c) such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation is necessary.

[12] Section 7 speaks to signature to the will:

7 Every will is, so far only as regards the position of the signature of the testator or of the person signing for the testator, deemed to be valid if the signature is so placed at, after, following, under, beside or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed in the will ...

[13] So that would allow for signatures that were not exactly located at the foot of the will to, notwithstanding, accomplish the purpose if the Court was satisfied that the testator intended to give effect by such signature to the writing in the will. That's the 1989 *Act* - the *Act* that was in full force and effect and governed the making of the handwritten document should that document be considered to be a will.

[14] So all agreed that at the time, and I'll agree in this matter, that at the time of the making of the handwritten will it was not a valid will in this province. In March of 2006 when Ms. MacDonald made that document , it was not a valid will.

[15] However, in 2006 the *Wills Act* was amended. In fact, the proclamation of the amended *Wills Act* did not take place until August 18th, 2008, but it was in 2006 that the amendments were made.

[16] The *Wills Act* of 1989 was amended by an *An Act to Amend Chapter 505 of the Revised Statutes, 1989, the Wills Act* and the relevant provisions of the amended *Act* for purposes of this application are as follows. These provisions are the provisions of the *Wills Act* of 2006 which, again, was not proclaimed until August 18th, 2008 -

coincidentally just shortly before the death of the testatrix - provisions of the 2006 *Act* that are specific to the matter before me. Firstly, as to handwritten wills:

1 Section 6 of Chapter 505 of the Revised Statutes, 1989, the Wills Act, is amended by adding "(1)" immediately after the Section number and by adding the following subsection:

(2) Notwithstanding subsection (1), a will is valid if it is wholly in the testator's own handwriting and it is signed by the testator.

[17] So that provision allowed for handwritten wills signed by the testator.

2 Chapter 505 is further amended by adding immediately after Section 8 the following Section:

8A Where a court of competent jurisdiction is satisfied that a writing embodies

(a) the testamentary intentions of the deceased; or

(b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,

the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.

[18] So that 8A was a brand new section added to the *Wills Act* that gave the courts of this province significant discretion - dramatic change. The courts, as a result of that section, have the ability, in circumstances where a document did not satisfy the

strict requirements of formality in the *Wills Act*, to, nevertheless, in circumstances where the courts were satisfied as to testamentary intention, the courts can find validity in those flawed documents. The courts now have the power, pursuant to s. 8A, to find documents that do not satisfy the formal requirements of the *Wills Act* nevertheless to be valid wills.

[19] The applicant makes reference to that section 8A proclaimed in force August 18th, 2008 and says that since that date the courts in this province are given a significant new power to give effect to testamentary intentions of testators and are not forced to have an intestacy, or a substantial intestacy, because formal requirements have not been observed, so long as the court is satisfied that the writing embodies the testamentary intent of the testator.

[20] The applicant submits that with that power and the exercise of that power, the document of 2006 - the handwritten document - which we know to be entirely in the handwriting of Ms. MacDonald, we know to purport to be her last will and acknowledged by her to the witnesses as her last will, in those circumstances the objector says the courts now have the power to determine testamentary intentions

and, as such, ought to prove this document - should provide this document - as a will and grant the probate that was sought with respect to the document.

[21] I have to say that given the circumstances of this case, given that we know that this lady prepared that document in her own handwriting, given the fact that she tried to have people successfully witness the process and told them that this was going to be her will, that would be a substantial argument in relation to testamentary intentions.

[22] Should s. 8A be applicable? Should there be retroactively? Should that section have application retrospectively or retroactively?

[23] The objector, Campbell, though, argues that the *Wills Act* 2006 does not apply either retroactively or retrospectively. The discussion granted dramatic new discretion granted by s. 8A of the amendments cannot be exercised in relation to a will made in March of 2006 - that handwritten will. The objector makes reference to a decision - the only decision that I'm aware of so far given in relation to the amendments to the *Wills Act* of 2006 - that decision made by Justice Patrick J. Duncan of this Court. The case is called *Re Thibault Estate* 2009 NSSC 4. By that decision of January 6, 2009, Justice Duncan deals with s. 6, not the same section we are dealing with - he's dealing

with s. 6 of the *Wills Act* of 2006 - that section, s. 6, provided for an addition of a new section 19A to the *Wills Act* of 1989, and that addition dealt with the capacity of a divorced spouse to serve as a personal representative and/or a beneficiary of their former spouse's estate.

[24] The question before Justice Duncan in *Thibault Estate* was this: does s. 19A of the *Wills Act* operate retroactively or retrospectively. So we're dealing with another section - dealing with the same *Wills Act* of 2006, dealing with the same issue of retroactivity or whether it can be applied retrospectively.

[25] Reference is made through a reference to another case, but eventually he gets to the text of Professor Driedger in *Statutes: Retroactive Retrospective Reflections* (1978), 56 Can. Bar Rev. 264 - I guess it was an article rather than a text - and in particular his conclusions which are summarized in s. 276 of that article - this is Professor Driedger's article in the Canadian Bar Review in which he defines retroactive and retrospective. He says, "a retroactive statute is one that changes the law as of a time prior to its enactment". A retrospective statute "is one that attaches new consequences to an event that occurred prior to its enactment".

[26] Justice Duncan, commenting on the *Wills Act* in *Thibault Estate*, points out that that *Act* does not contain a provision causing s. 19A, which is the section that he is dealing with, does not contain a provision causing s. 19A to operate retroactively, and I would say likewise that the *Act* does not contain a provision causing s. 6 or s. 8 to operate retroactively or retrospectively. There is nothing in the *Act* that speaks to retroactivity.

[27] Justice Duncan, in that decision, because of the nature of the issue and also the fact that he was the first judge to be dealing with the issue specific to the *Wills Act* of 2006, does extensive review of statutory interpretation as it relates to retrospective application of amendments to legislation. He also reviewed the *Interpretation Act*. He says at p. 8, the *Interpretation Act* stipulates in s. 3 the manner in which the effective date of an act is to come into force - the manner by which the effective date, the date that it comes into force, the manner in which that date is determined - and he says that the section that he's dealing with, s. 19A, became effective by proclamation - the *Wills Act* does not contain a transitional provision making s. 19A operate retroactively or retrospectively. Well, again, neither does it contain such a transitional provision in relation to ss. 6 and 8.

[28] Justice Duncan makes reference to the British Columbia case *Re Matejka Estate* [1984] B.C.J. 1945, which is made reference to in the Ontario Court of Appeal case of *Page Estate v Sachs*, [1993] O.J. 269. He quotes from that decision:

I agree with the underlying principle upon which the case was decided - that the presumption against retroactivity should apply where there is a prejudicial consequence imposed and where there has been no clear legislative intent to do so.

[29] Justice Duncan's attention was brought to the *Succession Law Reform Act* R.S.O. 1990, s. 17(2) and he found that there was a significant distinction between the sections of that *Act* - the section that was made reference to, s. 43 - and the Nova Scotia legislation and he cites from the Ontario *Act* at s. 43. It reads:

43 This Part applies to wills made before, on or after the 31st day of March, 1978 where the testator has not died before that date.

[30] So he's making reference to that s. 43 of the Ontario *Succession Law Reform Act*, clearly to point out an example of a reference within the legislation to the retroactivity of the provisions of a section of that Ontario *Act*. He is contrasting that with the Nova Scotia *Wills Act* of 2006 in which there is no such reference, no such clear unambiguous legislative intent expressed. The obvious suggestion is that it would have been simple and clear and easy for the Nova Scotia legislators, the Nova Scotia drafters, to have included such a section - a similar section to that s. 43 of the

Ontario *Act* - in the Nova Scotia legislation should they have wished that legislation to be applied retroactively.

[31] At p. 12 of the *Thibault Estate* decision, Justice Duncan says the Court concluded ss. 17(2) and 43 - we're now speaking of the Court in *Page Estate v. Sachs* in Ontario - when read together manifested a legislative intention that the provisions operate retrospectively. He says there is no equivalent in the Nova Scotia *Wills Act*. "Manifested" - I would say that "manifested" is the operative word - the word he is stressing. Obvious, made obvious - a legislative intent that the provisions operate retrospectively - no such provision in the Nova Scotia *Act* - he points that out.

[32] At p. 13 of his decision in the *Thibault Estate*, Justice Duncan concludes:

Section 19A of the **Wills Act** must be read prospectively. Such a conclusion is consistent with the general presumption that legislation should not be read retrospectively except where by clear language or necessary implication it should so operate. The language of the Act is clear and unambiguous, and there is no external evidence to suggest that the legislature intended a contrary conclusion.

That was Justice Duncan's bottom line.

[33] So the objector in this matter submits that all of the provisions of the *Wills Act* of 2006 - not just the section that Justice Duncan was dealing with - but all of the

provisions should be read prospectively as there is nothing in any of the sections - no section, no additional section, no indication whatever in the legislation by way of clear language or necessary implication that it should be applied retrospectively.

[34] The objector says in the case before the Court, s. 8A of the *Wills Act* that the section only applied to wills made after August 18, 2008 - the date of proclamation. And the objector makes the point, to say otherwise could only serve to create uncertainty in the Court of Probate.

[35] For instance, a suggestion by the objector, any wills such as the one in question in this case which were in existence prior to August 18, 2008, if found to be valid under this legislation, could only lead to possible problems in the existing probate files. If such a will had not been admitted to probate prior to August 18, 2008, but was in existence and a prior will had been admitted, it would conceivably open or cause proponents of the handwritten or of the flawed document to seek to have the document admitted into probate and have an effect on existing probate files would create, in terminology used by the objector, a nightmare for executors for the Court of Probate.

[36] If you look at the Ontario legislation, it certainly directs retrospective application and the Nova Scotia legislature could have done likewise and I guess if it had done so, then probate would have to deal with it. There seemed to me to be some validity in what the objector does say about the ramifications should s. 8 of the *Wills Act* 2006 be applied retroactively.

[37] The applicant did counter, suggesting that Justice Duncan's decision in *Thibault* should be considered applicable only to the section that he's dealing with, that he does not speak in broader terms and that, too, to the extent that retroactivity is determined by prejudicial consequences, that prejudicial consequences are a factor - the applicant says that there are no prejudicial consequences to the probate, to the finding of the document of March 2006 to be a valid will in relation to this matter. The applicant says no prejudicial consequences, rather the clear intent of the testatrix would be accomplished which would, the applicant suggests, be a good thing. Not prejudicial, beneficial. I suppose it ignores the reality that if the handwritten document were to be found to be valid, there were be a prejudicial effect - some of the beneficiaries under the original 1994 will, obviously if it didn't contemplate some prejudicial effect, but not perhaps at least to have the objection in relation to this matter.

[38] As to the conclusion, very simply I am persuaded by the research and reasoning accomplished by Justice Duncan of this Court in the *Thibault Estate* case. Particularly, I am likewise concerned that there is no clear, clearly stated legislative intent to cause the *Wills Act* of 2006, either generally or specifically in any of the sections, to be applied retroactively or retrospectively prior to its proclamation in 2008.

[39] I conclude that the presumption against retroactivity applies, that the handwritten document of 2006 is not a valid will, and that the Registrar was correct in not issuing a grant of probate. Quite simply, that s. 8A does not give me the discretion to interfere with this situation.

Kennedy, C.J.S.C.