

SUPREME COURT OF NOVA SCOTIA
Citation: Kerfont v. Fraser, 2010 NSSC 293

Date: 20100723
Docket: SY 299571
Registry: Yarmouth

Between:

Sharon Kerfont and Charlotte Star Mailman

Plaintiffs

v.

Robert W. Fraser and Tessa M. Maillett

Defendants

Judge: The Honourable Justice M. Heather Robertson

Heard: May 21, 26, and 27, 2010, in Yarmouth, Nova Scotia

Decision: July 23, 2010

Counsel: Gregory Barro, for the plaintiffs
Matthew Fraser, for the defendants

Robertson, J.:

[1] The plaintiffs Sharon Kerfont and Charlotte Mailman, seek a declaration that two deeds and a will executed by their mother Mary Elizabeth Fraser on the day before she died are invalid and be set aside, which would result in an intestacy, so that her property would pass to her children pursuant to the provisions of the *Intestate Succession Act*.

[2] The issues before the Court are:

1. Did Mary E. Fraser have the required legal capacity to execute the deeds and will on March 18, 2008?
2. If she had the legal capacity to execute these documents, was she under any undue influence by either of the defendants, Robert Fraser and Tesa Maillett, which would invalidate the deeds and the will?

[3] The burden of proving testamentary capacity is on the party propounding the will. In this case, the will has been executed pursuant to the requirements of the *Wills Act*, R.S.N.S. 1989, c. 505, in circumstances where there is strong evidence that the deceased read the documents carefully and fully understood them. Therefore, there is a presumption that the testatrix had legal capacity to execute the will.

[4] If the plaintiffs can satisfy the Court that there is evidence of suspicious circumstances, surrounding the execution of these documents, the burden of proving testamentary capacity reverts to the propounders of the will, Robert Fraser and Tesa Maillett. *Vout v. Hay*, [1995] 2 S.C.R. 876 (S.C.C.). On the issue of the gravity of the suspicion the Court at para. 24 referred to Ritchie J. in *Re Martin; MacGregor v. Ryan*, [1965] S.C.R. 757, at p. 766:

The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case.

With respect to fraud and undue influence the Court stated at para. 28:

. . . the principle has become firmly entrenched that fraud and undue influence are to be treated as an affirmative defence to be raised by those attacking the will.

They, therefore, bear the legal burden of proof. No doubt this reflects the policy in favour of honouring the wishes of the testator where it is established that the formalities have been complied with, and knowledge and approval as well as testamentary capacity have been established. To disallow probate by reason of circumstances merely raising a suspicion of fraud or undue influence would tend to defeat the wishes of the testator in many cases where in fact no fraud or undue influence existed, but the propounder simply failed to discharge the legal burden. Accordingly, it has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the will. See *Craig v. Lamoureux*, [1920] A.C. 349; *Riach v. Ferris*, [1934] S.C.R. 725; *Re Martin*, *supra*.

- [5] The plaintiffs state that the suspicious circumstances are as follows:
1. The will and deeds were prepared based upon instructions given to Russell Cushing by Robert Fraser, grandson of Mary Fraser;
 2. The will and deeds were executed by Mary Elizabeth Fraser on the day before her death after Tesa Mailett, her granddaughter was advised by Dr. Murphy that Mary Elizabeth Fraser should get her affairs in order;
 3. The legal effect of the deeds and will are such that the two Defendants received 100% of the estate of Mary Elizabeth Fraser when they would have only received a combined 10% of the estate had the documents not been executed;

[6] The plaintiffs are also critical of the actions of lawyer Russell Cushing, alleging that he did not make sufficient inquiry as to Mary Fraser's mental capacity, whether she had made past wills, and why she was excluding her three daughters and adopted son from her estate.

[7] Testamentary capacity is a well defined principle. *Feeney's Canadian Law of Wills*, 4th edition at 2.6 sets out the following:

To use the time-honoured phrase, a person must be “of sound mind, memory and understanding” to be able to make a valid will. When a will is contested on the ground of mental incapacity, the propounder must prove that the testator understood what he or she was doing: that the testator understood the “nature and quality of the act.” The testator must be able to comprehend and recollect what property he or she possessed, the persons that ordinarily might be expected to benefit, the extent of what is being given to each beneficiary and, finally, the nature of the claims of others who are being excluded.

BACKGROUND: THE FRASER FAMILY

[8] From all of the evidence before me I have gleaned the following facts.

[9] Mary Elizabeth Fraser died on March 19, 2008, at the age of 87 years. She was the widow of Lloyd Fraser, who died in 1990, at age 82. They had three natural children, the plaintiffs Sharon Kerfont, Charlotte Mailman and their eldest daughter Anne LeBlanc and an adopted son David. Anne LeBlanc died in May 2008, six weeks after her mother.

[10] Mary and Lloyd Fraser moved into 51 Ellis Road in Yarmouth shortly after their marriage in the early 1940's. There, they brought up their children.

[11] The property was just over 20 acres. They used the lands behind their home for grazing a horse or two and other farm animals until Lloyd's death in 1990. Later they would subdivide their property to provide some of their children with housing lots.

[12] On January 12, 1963, their eldest daughter Anne bore a daughter Tesa and soon thereafter a son Robert on November 30, 1963.

[13] Because Anne was young and unable to care for these two infants, Mary and Lloyd took the children and raised them as their own at 51 Ellis Road. By 1963, Sharon and Anne had left home and Charlotte remained there until her marriage in 1970.

[14] Tesa and Robert called Anne, Sharon, Charlotte and David their brothers and sisters. Not until their early teens did they become aware that Anne was actually their biological mother and not their sister.

[15] Tesa and Robert continued to reside with Mary and Lloyd Fraser, as their parents. After these two early pregnancies Anne had begun her own married life with Warren LeBlanc and subsequently had three more children, Angel born in 1969, Nicole born in 1971 and Mary Jane born in 1973.

[16] Anne, Warren and these three children eventually lived at 65 Ellis Road, in their own home, on a piece of land that had been subdivided off 51 Ellis Road. These three children referred to Tesa and Robert as uncle and aunt.

[17] When Tesa was 16 years of age she gave birth to Melissa, by her boyfriend Randy Comeau. They were young and remained in their own families and continued their schooling. Melissa was therefore brought home to 51 Ellis Road to live with Mary and Lloyd Fraser and Tesa's brother Robert.

[18] In 1984, Tesa married Randy Comeau and was given a parcel of land by Mary and Lloyd, a building lot subdivided off 51 Ellis Road, which became 53 Ellis Road. They built an interhab home there and bore another daughter Jennifer.

[19] Melissa had lived the first two years of her life in Mary and Lloyd's house, then lived next door with her parents and eventually Jennifer when the new house was completed.

[20] As both Randy and Tesa worked, Melissa returned to 51 Ellis Road each day after school to be looked after by Mary.

[21] Tesa divorced Randy, but retained 53 Ellis Road, where she has lived to this day with her husband Kenny Maillett, but for a brief period between her two marriages.

[22] Robert Fraser lived at 51 Ellis Road from his birth to the completion of school, when he moved to western Canada in 1988. However, when Lloyd Fraser died in 1990, he moved home to 51 Ellis Road to be with Mary.

[23] In March 1993, he applied for a development permit and put in footings on a lot owned by Mary, on the east side of Ellis Road, directly across from 51 Ellis Road, planning to build his own house there, with Mary's blessing. But that plan was postponed when he had some financial difficulty.

[24] Mary and Lloyd were trustees of a local Baptist church, which had a manse on the corner of Ellis Road and Argyle Street contiguous to their own property. After the church disbanded, Sharon Kerfont and her husband, were able to purchase the manse property in 1973. They had an expectation that Mary would enlarge their property by adding to it lot B from a subdivision of Mary's lands on Ellis Road. Mary did not sell or gift this additional piece of land to Sharon.

[25] Sharon sold the manse in 1977 and moved away to Calgary.

[26] In 1991, Sharon (then divorced) had the opportunity to buy another building lot on Ellis Road, out of Mary's land on the condition that she build a home on these lands within one year or else deed the property back to Mary. She did not build on this parcel.

[27] Mary sued Sharon in 1999 and the matter was settled when Sharon deeded the lot back to Mary.

[28] Charlotte was never deeded a lot on Ellis Road. She lived at home until age 22 when she married Gregory Mailman. They moved up the valley to Nictaux, where she resides to this day.

[29] Their adopted son David was also not deeded land out of 51 Ellis Road. He too left home after finishing school, but visited often until he had a confrontation with Mary and Lloyd just before Lloyd's death in 1990. He left the family home never to return. He resides in Clarke's Harbour and is a coast guard engineer. David is not a party to this action.

[30] By the account of all the witnesses to this proceeding Mary Fraser was a headstrong, independent woman. After her husband Lloyd's death in 1990, she continued to live independently in the family home.

[31] She was a large woman, over three hundred pounds and in her later years was limited in her capacity to get around. She drove her own car until 2004. She had been diagnosed with uterine cancer in 2000, but chose not to be treated and lived alone until her death in 2008.

[32] Of all of her children, including Tesa and Robert, it is obvious from all of the evidence before me, Mary was closest to Tesa and Robert who never really left home. I say this in a metaphorical sense because their relationship with Mary Fraser was so very good and so constant.

THE EXECUTION OF DEEDS AND A WILL

[33] As Mary's cancer progressed, she was hospitalized for short periods, often less than a day, during which she would receive a blood transfusion. There were three such hospitalizations between January and March 2008. Her granddaughter Tesa took care of her, as did Robert who returned home between his coast guard assignments. Each time she was hospitalized Tesa called Robert immediately and he returned.

[34] Dr. Muise was Mary's physician for over 25 years. Mary was hospitalized for the last time on March 8, 2008. He saw Mary daily until her death on March 19, 2008. He cautioned Robert and Tesa that their grandmother would not be going home this time and it would be wise to ensure she had her affairs in order. He told this to Mary as well.

[35] It is Tesa and Robert's evidence, that acting on instructions from Mary they were to contact Clifford Hood to prepare deeds with respect to the Ellis Road property, as she had been intending to do for some time. Their evidence is that Mary wanted to give the eastern lot, opposite to 51 Ellis Road, to Robert, the same lot he had earlier begun development on. Since Tesa owned number 53 Ellis Road, next door Mary wanted her great-granddaughter Melissa to have the homestead at 51 Ellis Road, as she was starting out in life with a new baby. Lastly, their evidence is that a portion of the lands to the rear of 51 Ellis Road behind Tesa's house was to be Tesa's, as she had been using this land as a grazing pasture for her horses, goat and a cow for the last many years of Mary's life. Their evidence is that the homestead would be deeded to Robert Fraser and Tesa Maillett and Mary Elizabeth Fraser as joint tenants with right to survivorship and that after Mary's death Robert and Tesa would carry out Mary's wishes and procure the necessary subdivision of the lands to give effect to her wishes.

[36] The value of Mary's estate was really her property, a modest home and the accompanying acreage for grazing. Charlotte estimated its maximum value at \$80,000, but no other value was ascribed to it.

[37] As Clifford Hood was too busy at the time, Robert's evidence is that he called Russell Cushing and gave instructions to him for preparation of the deeds.

[38] Russell Cushing's evidence was that he prepared the requested deeds and suggested a simple will as a "catch all" for the balance of the estate. The only other property consisted of some personal belongings at 51 Ellis Road and a Royal Bank of Canada bank account, with enough funds in it to pay for Mary's burial.

[39] Mr. Cushing attended the hospital just after 5 p.m. on March 18, 2008, when he had completed his own workday. He had earlier called Dr. Muise and asked him to perform a neurological assessment on Mary and report whether she had the requisite cognitive function to instruct Mr. Cushing of her wishes and to understand the documents that he had prepared. By telephone, Dr. Muise told Mr. Cushing that in his opinion Mary Fraser was mentally fit and capable of understanding and executing legal documents. His report has been filed with the court as a physician's narrative pursuant to *Civil Procedure Rule 55.14*. No rebuttal reports were filed by the plaintiffs pursuant to *Civil Procedure Rule 55*.

[40] Russell Cushing testified as to the steps he took before Mary signed the deeds and will.

[41] He first cleared Mary's hospital room, leaving Sharon, Tesa, Robert and a witness Fergie MacDonald in the hallway. He did not show Mary the two deeds and will he had prepared but first asked her to tell him her wishes with respect to the disposition of her property. He spoke with her for 20 minutes about her wishes, her family and the loss she suffered after her husband Lloyd died.

[42] He testified that he was satisfied her instructions conformed to the drafted documents. She read over the deeds carefully and thoroughly and then signed them. He then called in the witness Fergie MacDonald and executed the will in accordance with the provisions of the *Wills Act*.

[43] When finished, he allowed the other family members to return to the room and said goodbye to them.

[44] He made a few notes after the execution of the deeds and will. Mr. Cushing testified that he could not recall in detail his conversation with Mary as two years

had passed, but testified he did ask about her other children and noted daughters and David, whom Mary said was “in the military.”

[45] Although in the coast guard, this reference to the military is explained in Robert’s evidence as he described the joint task force nature of the rescue work both he and David undertake on behalf of the military and the Coast Guard, their formal employer. Indeed, Robert and David work together.

[46] In all of the circumstances of this case, I can find no suspicious circumstances that meet the required degree of proof that might warrant the declaratory relief sought. I am satisfied on the balance of probabilities that Mary Fraser had the requisite testamentary capacity to execute her will and the deeds in question. Nor can I find from all of the evidence before me any evidence of Robert and Tesa having asserted any undue influence on their grandmother. Indeed, I find that they were good and loyal children who continuously cared for her.

[47] I am satisfied that although Robert and Tesa Fraser provided the instructions to Robert Cushing so that he could prepare the requested deeds, that they did so at the request of Mary Fraser, who took Dr. Muise’s advice and was determined to tidy up her own affairs before her death. I accept their evidence as being both credible and truthful.

[48] The fact that Mary Fraser executed these deeds and will the day before her death is not in and of itself a suspicious circumstance when one considers the clear evidence of Dr. Muise and Russell Cushing as to her sound mental capacity.

[49] I am also satisfied that Mary Fraser divided her modest estate, essentially the land, in a manner that she wished. Her grandchildren Robert and Tesa and great-granddaughter Melissa, were the family who lived nearest her on the homestead lands. She had no other estate to give and her daughters, the plaintiffs Sharon and Charlotte, as well as David were well established with their own lives, family and properties, away from the homestead.

[50] The evidence of Dr. Muise is compelling. Dr. Muise knew his patient well. He found her to be alert and able to answer all of his questions. He testified he spoke to her at length about end of life issues. He found her to be capable of abstract cognitive function with the ability to make decisions. In short, he found her to be mentally fit. He believed her capable of understanding legal documents.

[51] Armed with this favourable report from Dr. Muise, Mr. Cushing spent time with Mary Fraser and sought out her own wishes with respect to the disposition of her property. In my view, his procedures did not fall below the standards of practice one would expect of a lawyer engaged to follow the instructions of a dying woman. Mr. Cushing first satisfied himself of her competency by asking for Dr. Muise's assistance and next satisfied himself personally by meeting with her in private. He found her to be alert, aware and fully capable of understanding the documents he brought with him to her hospital room and which she subsequently executed.

[52] He did not show her the deeds he had prepared at Robert Fraser's instruction. He asked her what assets she owned and Mary Fraser confirmed for Mr. Cushing, what property she owned and how she wished it to be distributed. The deed to Robert Fraser is a gift *inter vivos* of the lot on the eastern side of Ellis Road, the very same land she had planned to give him at an earlier time.

[53] The deed for the balance of the land to Robert and Tesa, carried out her wishes with respect to the balance of the lands, that required further survey and subdivision soon accomplished after her death.

[54] In my view, this is the case of a woman who knew her own mind and wanted to see her lands deeded to the family that was closest to her and very much present in her life.

[55] There is no evidence before me to suggest that Mary Fraser was not fully competent or that she was under any undue influence.

[56] In the result, the plaintiffs' claim is dismissed. The deeds executed by Mary Fraser are valid instruments as is the will she also executed in accordance with the requirements of the *Wills Act*.

[57] I will be happy to hear submissions in writing on the matter of costs, failing any agreement.

Justice M. Heather Robertson