

PROBATE COURT OF NOVA SCOTIA

Citation: Hand Estate (Re), 2010 NSSC 297

Date: 20100726

Docket: Probate No. 56949

Hfx No. 325163

Registry: Halifax

The Estate of Pauline Hand

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date of Hearing: June 21, 2010

Counsel: B. William Piercey, Q.C., counsel for the applicant, Richard Hand
A. Douglas Tupper, Q.C., Dan Wallace, and Sara Mahaney, counsel for the respondents, Dr. Robert F. Hand, Miranda Hand Spilios and Penelope Courtin
Timothy C. Matthews, Q.C. and Jason Cooke, counsel for the Estate of Pauline Hand

Moir, J.:

Introduction

[1] The home of Ms. Pauline Hand and her husband, Dr. Robert Hand, was a condominium on Summer Street in Halifax. They held title as joint tenants.

[2] In November of 1999, the Hands changed their wills. Together, they consulted and instructed Mr. Thomas Burchell, Q.C., and they executed the wills at his office together.

[3] The Hands had three children, a daughter and two sons. The wills provided for a fund for the daughter or grandchildren, a condominium in Florida for one son, and the Summer Street condominium for the third.

[4] Ms. Hand died in 2008. Afterward, Dr. Hand conveyed the Summer Street condominium into trust, revoked his 1999 will, and made a new will leaving much of his property to his daughter.

[5] The applicant, Mr. Richard Hand, is the child who was to receive the Summer Street condominium under the 1999 wills. He contends that those wills were mutual and were subjects of a promise against revocation. He applies for an order that he has a one-half interest in the condominium.

[6] Dr. Hand, his daughter, Miranda Spilios, and his granddaughter, Penelope Courtin, contend that the condominium remained in joint tenancy and, accordingly, passed wholly to Dr. Hand when his wife died. Alternatively, they say that if the 1999 wills purported to sever the joint tenancy, they were contrary to s. 8(1)(a) of the *Matrimonial Property Act* and are liable to be set aside under s. 8(2).

[7] In my assessment, the 1999 wills are not mutual and they are not subject to a promise against revocation. I will dismiss Richard Hand's application.

Revocation of Wills

[8] The law of this subject was discussed by Justice Nathanson in *Harvey v. Powell Estate*, [1988] N.S.J. 299 (S.C.).

[9] Justice Nathanson defined mutual wills as "separate wills [as opposed to a joint will] made by two persons which contain reciprocal provisions" (para. 19). He said, at para. 20 "Mutual wills, like all other wills, are revokable." However, an "agreement against revocation can be enforced." The will remains revokable, but, according to a passage adopted by Justice Nathanson from *Theobald on Wills*, "equity protects and enforces the interests created by the agreement despite the revocation of his will by one party after the death of the other party without having revoked his will."

[10] Justice Nathanson referred to authorities at para. 21 to 23 and he summarized them in two concise propositions. "There must be evidence that the testators agreed that after one of them died the survivor would not revoke his or her will" (para. 22). "The terms of the agreement must be reasonably precise so that they can be enforced by the court" (para. 23). The authorities referred to by Justice Nathanson also show that the agreement may be expressed or implied, and it may be implied from the mutual wills and the surrounding circumstances.

Terms of the 1999 Wills

[11] Both of the 1999 wills appoint the Hands' sons, Richard Hand and Thomas Gordon Hand, as trustees.

[12] There is a remarkable difference between the two wills. Dr. Hand conveys all his property to Ms. Hand absolutely if she survives him. Ms. Hand makes no such provision for Dr. Hand. She conveys all her property to the trustees, regardless of her husband's survival.

[13] Dr. Hand's will requires the trustees to transfer the Summer Street condominium to Richard Hand "[i]f my wife, Pauline Hand, predeceases me". In light of this condition, the joint tenancy is not a problem.

[14] Ms. Hand's will requires the trustee to transfer the condominium to Richard Hand absolutely. Since no provision was made for Ms. Hand's earlier death, the gift fails unless, in that event, Dr. Hand is bound to continue his will in its 1999 state.

[15] The wills also differ from one another in the other gifts. The trustees are required to convey the Florida condominium to Thomas Gordon Hand in Ms. Hand's will, but no mention is made of it in Dr. Hand's will because he did not have title and was not a beneficiary under his wife's will.

[16] Dr. Hand's 1999 will granted the residue of his estate to two of his granddaughters in trust for their educations until they were twenty-five and to be distributed to them at that time. Ms. Hand's will provides a trust for her daughter and her granddaughter by that daughter, and she directs payment of the residue to her sons.

[17] These are not mutual wills as defined by Justice Nathanson. Further, their similarities do not, in light of the differences, suggest a requirement against revocation. On their own, the terms suggest to me the flexible norm of revocability.

[18] Mr. Burchell wrote to his clients, providing a contemporaneous narrative for the decisions underlying, and the effects of, their 1999 wills. He also testified.

This evidence provides the most reliable source for the surrounding circumstances of the wills.

[19] Mr. Burchell said that the master plan for the Hand estates was established in the 1980s. It was for a three way division of the combined assets accomplished by conveying one condominium to one son, another to the other, and money for the daughter.

[20] This plan did not change substantially in 1999, except various (and I would add, conflicting) provisions were made for grandchildren (and, I would add, the daughter was then treated inconsistently).

[21] Mr. Burchell met with both clients together. The discussion in 1999 centered as much on concern for their daughter, and a trust for her, as it did on the condominium to go to Mr. Richard Hand. The later was always their plan and they always made that clear to Mr. Burchell. In Mr. Burchell's view, the basic plan remained the same in 1999.

[22] Mr. Burchell recalls no discussion about revocation in 1999. However, "their resolve was this was the estate plan and they were continuing with it." Obviously, they were content to revoke their earlier wills.

[23] Mr. Burchell's reporting letter contains advice about the joint tenancy, which has serious implications for the theory against revocation. He pointed out that "you own the condominium as joint tenants". When one dies, "the survivor will be the sole owner". Thus, "we have inserted a similar clause with respect to the devise of the...condominium...in both wills". This was because "the devise will only take place upon the death of the survivor".

[24] Mr. Burchell explained that the Hands were pleased to keep their matrimonial home in joint tenancy so as to avoid probate fees. However, those words, "the survivor will then be the sole owner" obviously raise the issue of the freedom of the sole owner to do as he wishes with his property.

[25] I accept that, in 1999, the Hands decided to continue, in some general way, their plan for their estates. I accept that they were resolved to continue with the

Summer Street property going to Richard Hand. However, that evidence suggests they both realized that the 1980s plan could be continued or changed.

[26] If anything, the evidence suggests that the Hands were prepared to live with the consequences of "the survivor will then be the sole owner". This does not support the implication of an agreement against revocation.

Subsequent Events

[27] Much evidence has been provided about communications among family members after the 1999 wills were made. Removed as they are from the actual event, this evidence provides a weaker source for implying an agreement about revocation. Further, none of this evidence supports a finding that the Hands made an agreement against revocation. At most, it suggests that the intention to leave the Summer Street condominium to Richard Hand remained for a good number of years.

[28] The Florida condominium was conveyed to Thomas Gordon Hand under an agreement of purchase and sale. That happened in 2002 and, at most, it shows that

the Hands' intention had not substantially changed for that gift. This does not found an implied agreement against revocation.

[29] In 2002, Ms. Hand revoked her 1999 will and made a new one with minor changes. This certainly does not support the finding of an agreement against revocation. If there was one, Ms. Hand breached it.

Authorities Relied Upon by Richard Hand

[30] *Re. Kerr*, [1948] O.R. 543 (S.C.) involved a joint will the terms of which were found to include an agreement that neither of the signatories would revoke the will. Neither the form or the terms of Pauline Hand's will support such a finding.

[31] *Pratt v. Johnson*, [1959] S.C.R. 102 involved a joint will in which the survivor got a life estate and the parties expressly agreed "[u]pon the decease of the survivor it is our desire that our property...be divided as follows". The Hand wills are not joint or mutual, and they contain no provision about what will happen to the Summer Street condominium if Dr. Hand survives. Further, as Mr. Burchell's

letter shows, the parties were specifically advised about the continuation of the joint tenancy and its consequences.

[32] *Re. Gillespie*, [1969] 1 O.R. 585 (C.A.) also involved a joint will in which the parties expressly provided for disposition on the death of the survivor.

Conclusion

[33] I find the 1999 Hand wills were not mutual. In any case, neither the terms of the wills nor their surrounding circumstances support the implication of an agreement against revocation. On the contrary, I find that the testators intended to remain free to change their minds.

[34] I dismiss the application of Mr. Hand. The parties may make submissions on costs in writing.