PROBATE COURT OF NOVA SCOTIA
Citation: Sampson v. Dilney Estate, 2011 NSSC 29

Date: 20110124
Docket: Syd. No. 331980
Probate No. 19258
Registry: Sydney

In the Estate of Blanche Dilney, Deceased

Application of Judy Sampson, Executrix

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	January 12 & 13, 2011, in Sydney, Nova Scotia
Counsel:	David Parsons, Q.C., for the Applicant, Judy Sampson David MacIsaac and Lee Anne MacLeod-Archer, for the Respondent, Richard Dilny

By the Court:

INTRODUCTION

[1] Mrs. Blanche Dilney passed away in May, 2003. She was testate, having executed her Last Will and Testament in January of 2003. During her lifetime, Mrs. Dilney was fortunate to own certain real property located in Howie Center, along the shores of Sydney River. More importantly, she was blessed with seven children, all of whom were beneficiaries under her Will. Disagreement has arisen among the siblings as to the interpretation of particular provisions of their mother's Will. The Court has been asked to assist in that regard. The provision which the Court has been asked to interpret reads as follows:

> 3. I DIRECT my Trustee to transfer, pay over and deliver to my son, RICHARD DILNEY, the use and utilization of two (2) acres of land that his business is situate on including a right of way access until the business ceases operation or my son, RICHARD DILNEY passes away at which time it will be sold at fair market value and the balance of the sale proceeds, after deductions of real estate commissions and legal fees and other closing expenses, shall fall into and form part of the rest and residue of my Estate.

ISSUE BEFORE THE COURT

[2] In order to ascertain the scope of the determination to be made by the Court, it is helpful to reference the documentation filed in support of the Application. By way of Notice of Application filed with the Court in May of 2010, personal representative Judy Sampson seeks "an interpretation of the provision of the Last Will and Testament of the late Blanche Dilney". In her supporting affidavit, Ms. Sampson provides further clarification as to the purpose of the present Application. In paragraphs 3(h) and (i) she states:

> h. I am requesting the Court help clarify the language as contained in paragraph three (3) of her Last Will and Testament. Stated as follows:
>
> > "use and utilization of two (2) acres of land that his business is situate on including a right of way access until the business ceases operation or my son, Richard Dilney passes away at which time it will be sold at fair market value and the balance of the sale proceeds, after deductions of real estate commissions and legal fees and other closing expenses, shall fall into and form part of the rest and residue of my Estate".
>
> i. That the Court clarify whether the language in paragraph (3) should be interpreted as to my understanding and direction that the portion of land that the business, referred to in my mothers Will, be entitled to occupy and use be limited to the two (2) acres of land occupied and used at the time of execution of the Will or the expanded acreage that the business is presently occupying and using.

[3] On November 4, 2010, Richard Dilny, one of the heirs under the Will of Blanche Dilney, filed a Notice of Objection with the Court, "contesting the interpretation of the provisions of the Last Will and Testament" of his mother, as put forward by Judy Sampson. (Mr. Dilny testified that he spells his surname without an "e", unlike the spelling which appears in the documentation before the Court relating to his mother).

[4] Given the scope of the Application as noted above, this Court views that its function is to interpret the provision of Mrs. Dilney's Will and attempt to ascertain her intention. There was some suggestion by the Estate that once the Court had undertaken an interpretation, that it should consider appropriate remedies if it determines that Mr. Dilny has been occupying the property beyond what was intended by his mother. Clearly, this was not part of the Application brought by the Estate, and the Court views that any results flowing from the interpretation to be undertaken herein, are more appropriately addressed in future.

POSITION OF THE PARTIES

[5] The Estate submits that the bequest of 2 acres to Richard Dilny was intended to include only that area being occupied and used for business purposes by him, at the time of Mrs. Dilney's death. The Estate submits that since his mother passed away, Mr. Dilny has expanded his usage of the lands in question, extending well beyond an area of 2 acres, and for purposes which are unrelated to any business being undertaken by him. In submissions, Counsel for the Estate asserted that the 2 acres was intended to be adjacent to a lot owned by Mr. Dilny where he had built a garage building, and where the majority of his business pursuits were undertaken. This area has been identified as the "Company lot" in a draft plan prepared in 2004, following Mrs. Dilney's death. Further, the Estate challenges the position advanced by Mr. Dilny that the bequest was a life interest, but should be considered merely a license.

[6] Mr. Dilny takes a different approach, and advanced three different aspects in his submissions. Firstly, it was submitted that the nature of the bequest had to be determined as a preliminary consideration, with Mr. Dilny asserting that the bequest should be viewed as a life estate, as opposed to a license. Secondly, Mr.

Dilny asserted that the bequest of 2 acres was in no way confined to a particular area as suggested by the Estate, and that he was entitled to select where his acreage would be located. Finally, Mr. Dilny argued that the portion of the bequest which referenced the cessation of the business, should not be considered as a valid condition subsequent, given its inherent uncertainty.

EVIDENCE

[7] The Court heard evidence from six witnesses, including personal representative Judy Sampson and Richard Dilny. In addition to siblings Kevin Dilney and Joseph Dilney, witnesses Harold Ramsey and Glen Bagnall testified as to the use of the property in question over a period of time. Before examining the areas of evidence which are contested, it is perhaps advisable to summarize those factual underpinnings which do not appear to be challenged.

[8] As noted above, Mrs. Dilney prepared her Will in January of 2003, while in hospital. There is no suggestion that she was not competent. The Will was prepared by legal counsel. Mrs. Dilney passed away four months later, in May of 2003.

[9] Prior to her death, Mrs. Dilney retained the services of surveyor Raymond McKinnon to undertake a subdivision of her real property located at Howie Center. The survey, dated September 17, 2002, served to create two parcels: Lot 2002-1 which contains Mrs. Dilney's home and is referred to as the "homestead" lot, and Lot 2002-2, which contains the remainder of real property owned by her. Both sides agree, that the 2 acre bequest to Mr. Dilny is to be located within Lot 2002-2, although this is not specifically referenced in the Will.

[10] Following Mrs. Dilney's death, Richard Dilny made arrangements to purchase from the Estate, the homestead property. He now resides there. Further, Mrs. Sampson retained engineer Glen Hannem to undertake a proposed subdivision plan of the lands contained in Lot 2002-2. This proposed plan serves to divide Lot 2002-2 into six lots plus two smaller remnant lots. Lot #1 as created by Mr. Hannem, has been referred to throughout the evidence as "the Company lot", and contains approximately 3.75 acres.

[11] The subject matter attracting the most divergence in terms of the evidence provided to the Court, is the nature of Richard Dilny's use of his mother's property,

both in terms of time frame and whether his actions should be properly characterized as "business" pursuits. Judy Sampson testified as to her brother's use of the property owned by her mother, both prior to, and after her mother's death. With respect, Mrs. Sampson's evidence relating to this issue was confused and inconsistent at best. Although she asserted at the end of her testimony that up to her mother's death, Richard Dilny had only used property within that lot designated as the "Company lot", and it was in subsequent years that he expanded into other areas, her evidence on this issue is of little value to the Court, and inconsistent with the evidence of others, including Kevin Dilney, also called by the Estate.

[12] Kevin Dilney testified that until 2002, he was in business with his brother Richard. As such, he was aware of how his mother's property was being utilized for business activities, certainly up to 2002, and to a lesser extent, beyond that time frame. He testified that in the early years of the business, around 1985, equipment was parked on that area identified as Lot #3 on the Hannem plan. However, around 1987 or 1988, a garage was built on property owned by Richard, and this garage, and the area adjacent to it, became the main area for business activities. This area would be within Lot #1 - the "Company lot". Mr. Dilney testified that, notwithstanding the building of the garage, other areas of his mother's property did

continue to be used for business purposes, up to his departure from the business in 2002. Specifically, he testified that Lot #3 was used for the storing of plant materials required for various contracts, and Lot #4 was utilized for the screening of material, involving the use of a "screener", a large piece of equipment. On cross-examination, Mr. Dilney confirmed that in addition to the above, while he was involved with the business, excess sod was on occasion placed on Lot #3, and potentially Lot #4, and that they would traverse across Lots 4, 5 and 6 in order of obtain water from the river for hydroseeding. Mr. Dilney further confirmed on cross-examination, that Richard had been involved in placing fill in Lot #2, expanding the size of the lot, and similarly, the business had been involved in filling in a frog pond on Lot #4, in the same area where the screener was subsequently placed. These activities were undertaken prior to 2002. Contrary to the view expressed by Judy Sampson, Kevin Dilney's evidence supports that Richard, in the course of his business pursuits, was using areas of their mother's property beyond "the Company lot" well before Mrs. Dilney executing her Will, and the date of her passing.

[13] Kevin Dilney further testified however, that since 2002, Richard's use of the property has expanded to include non-business related activities, including the

parking of vehicles, and the dumping of trash. Mr. Dilney advised the Court that he had recently undertaken measurements on the "Company lot", and that it contains roughly 1.5 to 1.6 acres of "useable" land, the balance of the 3.75 acres being "swampy".

[14] Glen Bagnell has worked for Richard Dilny since 2000 on a seasonal basis. He testified as to the business' use of various areas of the property. Although sod was usually delivered to the garage, two or three times a season excess sod would be laid out in an area identified by the witness as being within Lot 2, as well as Lots 4 and 5. Mr. Bagnell also testified since he started working for Mr. Dilny, there has been material such as pea stone, gravel and topsoil stockpiled on Lots 4 and 5, and that the same lots were crossed in order to obtain river water for hydroseeding.

[15] Richard Dilny testified, his evidence relating to the usage of his mother's property being consistent with that of his brother and Mr. Bagnall. Well before 2003, he was utilizing various areas of this mother's property for various business activities, some of which have continued, although the business has slowed down in recent years. Mr. Dilny testified that in the 1990s he built a road from what is

now identified as the "Company lot", behind the lots owned by himself and Greg Dilney, to his mother's property. The purpose of the road was to permit Mr. Dilny to gain easy access to a fuel tank which he used for the business, which was located on his mother's homestead property. He still uses this tank. This roadway is also used by large trucks making deliveries to his garage, as it permits the vehicles to enter off and on Route #4 without necessitating either backing onto the roadway, or needing to make a turn on the property. Mr. Dilny confirmed that he has been, both before and after his mother's death, using in excess of 2 acres for his various business activities. He estimates that the area within the "Company lot" which is suitable for use, is about 1 acre, the rest being swampy.

[16] Mr. Dilny further testified that he has, at the request of his sister Judy Sampson, cleaned up several areas of the property. Mr. Dilny further testified that since early 2004, he is the owner of his mother's former home - "the homestead" property, but he still owns the property on which his garage is located.

THE LAW

[17] Both parties have provided the Court with the same legal authority relating to the appropriate approach to be taken in undertaking an interpretation of a testator's intentions. The Court agrees that the approach outlined by Davison, J. in ***Re Carter Estate*** (1991), 109 N.S.R. (2d) 384, provides a valuable "road map" for the interpretative task to be undertaken. His Lordship writes:

> 16. The principles used in interpretation of wills were considered by the Appeal Division of this court in Re O'Brien (1978), 25 N.S.R. (2d) 262 at 266 where Cooper, J.A. approved of the rules enunciated by Kelly, J. Of the Ontario High Court in *Re Kirk* (1956), 2 D.L.R. (2d) 527 at 528:
>
> > In my opinion, the first duty of the Court in construing a will is to ascertain the intention of the testator from the language used in the will. The proper procedure is to form an opinion, apart from the cases, and then determine whether the cases require a modification of that opinion; the Court should not begin by considering how far the will resembles others on which decisions have been given: *Re Blantern, Lowe v. Cooke*, [1891] W.N. 54.
> >
> > There are certain rules of construction to which a Judge ought to adhere, viz: (1) To read the will without paying any attention to legal rules: per Lord Davey in *Comiskey v. Bowring-Hanbury*, [1905] A.C. 84 at p. 89; (2) to have regard not only to the whole of the clause which is in question, but to the will as a whole, which forms the context to the clause: per Lord Birkenhead L.C. in *Lucas-Tooth v. Lucas-Tooth*, [1921] 1 A.C. 594 at p. 601; (3) to give effect, if possible, to all parts of the will and

> so to construe the will that every word shall have effect, if some meaning can be given to it and if such meaning is not contrary to some intention plainly expressed in other parts of the will: see 34 Hals., 2nd ed., s. 252, pp. 197 et seq.; (4) when the Judge thus determines the intention of the testator he should inquire whether there is any rule of law which prevents effect being given to it: *Hodgson v. Ambrose* (1780), 1 Doug. K.B. at p. 342, 99 E.R. 216.

17. I approve of the approach of Mr. Justice Krever in *Re Crawley* (1976), 68 D.L.R. (3d) 193 which is not inconsistent with the previous authority to which I referred. Krever, J. stated at 195:

> As to the particular language used by the testator, the following propositions are, in my view, so well established that they need no citation of authority to support them:
>
> (1) A fair and literal meaning should be given to the actual language of the will.
>
> (2) An opinion as to the meaning should be formed first without regard to the cases, which should afterwards be looked at to see if modification of the opinion is required.
>
> (3) The ordinary and grammatical sense of the words should be assigned.
>
> (4) The words should be given the meaning that was intended by the testator, in view of the context and the surrounding circumstances.
>
> (5) A natural and ordinary meaning should be given in preference to a secondary meaning.

DETERMINATION

[18] The main factual issue presented by the parties was the nature of Mr. Dilny's usage of this mother's property at the time she executed her Will, and at the time of her death. The parties submit that this factual determination may be of assistance to the Court in undertaking an interpretation of the disposition contained in Mrs. Dilney's Will.

[19] The Court is satisfied that Mr. Dilny has, for a number of years, both before and after 2003, used various areas of his mother's property for business activities. The Court is also satisfied that Mrs. Dilney, given the location of her home near to the various activities, would have been aware of Mr. Dilny's usages. From the evidence before the Court however, the area used most consistently and regularly by Mr. Dilny would be that adjacent to the garage built on the smaller lot owned by him.

[20] How does the above determinations impact on the interpretative task to be undertaken by the Court? The approach as outlined by Davison, J. in ***Re Carter Estate, supra*** remains a valuable "road map" and ought to be applied in light of the factual determinations made. Looking first to the actual wording of the Will, the

Court is not only mindful of the wording of Clause 3 relating to Mr. Dilny's bequest, but to other provisions which relate to Mrs. Dilney's overall intentions. In particular, the Court notes the following provisions:

> 5. I DIRECT my Trustee that any remaining property both real and personal I have at the time of my death is to be sold at fair market value less any applicable real estate commissions, legal fees or any other costs shall form part of the rest and residue of my Estate.
>
> 9. I HEREBY EMPOWER my Trustee with the expressed power to sell any part of my estate which she in her absolute discretion deems advisable and to give such deeds or conveyances as necessary to perfect such sale.

[21] It should be further noted that Mrs. Dilney ultimately divided the residue of her Estate equally among her seven children.

[22] It is clear, at least in the Court's view, that Clause 3 reflects that Mrs. Dilney gave careful consideration to the need for Richard to continue to utilize a portion of her property following her death, but balanced this with the need to also benefit her other children, and in particular to have the remainder of her property sold at fair market value. This balancing was achieved by virtue of both Clauses 3 and 5. Mrs. Dilney had, prior to her death, undertaken the task of creating a subdivision of her property, creating Lots 2002-1 and 2002-2. She was, in light of this, aware of

the extent of her property. As such, the Court views her use of the term "2 acres" as being purposive, and specific. There is nothing before the Court to suggest that the ordinary meaning of "2 acres" should not be applied. Notwithstanding that Mr. Dilny may have utilized an area in excess of 2 acres, the Court finds that Mrs. Dilney intended the bequest to him to be limited as stated in the Will.

[23] Where is the 2 acres to be located? The Court rejects the suggestion that the 2 acres to be utilized by Mr. Dilny may be divided into two or more smaller areas. It would, in my view, be entirely inconsistent with the directions contained in Clause 5 to sell the remaining property at fair market value, to have it subject to small pieces in a "patchwork" throughout Lot 2002-2. It was suggested to the Court that the inclusion of a "right of way access" in Clause 3 was supportive of Mrs. Dilney contemplating that the 2 acres may be comprised of more than one parcel, it allowing Mr. Dilny to travel between two or more locations. With respect, I disagree. Looking at the context and surrounding circumstances, the Court views it as being more probable that the reference to the right of way was in light of the fact that Mr. Dilny had, for a number of years, travelled across his mother's property to gain access to a fuel tank on the property utilizing a lane leading from her home, behind the properties of he and his brother, and that she

wished this ability to continue. The Court finds that Mrs. Dilney intended that Richard was to have the right to use a single parcel being 2 acres in area.

[24] The evidence relating to the usage of the property by Mr. Dilny has been used by the parties to suggest where Mrs. Dilney intended for the 2 acres to be located. Mrs. Sampson's view that her mother could have only intended the area to be located in what is now designated as the "Company lot" because her brother only ever used this area during their mother's lifetime, is clearly unsupportable based on the factual finding made previously by this Court. It should be kept in mind that the lots, including the "Company lot" were creations of Mr. Hannem, after Mrs. Dilney's death. Although referencing the various Hannem lots was convenient for presenting and understanding the evidence, these designations cannot be used as a reflection of Mrs. Dilney's intentions. By way of example, it is difficult to accept Mrs. Sampson's view that her mother intended the 2 acres to be located exclusively within the "Company lot", when apparently less than 2 acres of that particular lot is useable given its swampy nature. There is nothing to suggest in the wording of the Will that Mrs. Dilney expected as a condition of the bequest, that Mr. Dilny was required to undertake reclamation efforts in order to create a sufficient acreage to meet the terms of the gift.

[25] The Court is satisfied however, again based on the context and surrounding circumstances, that Mrs. Dilney intended the two acres to be in an area adjacent to the garage Mr. Dilny has utilized for his business. The evidence disclosed that the garage itself is quite close to the boundary line of Mr. Dilny's property, and it is clear that at least a portion of "the Company lot" has been used consistently in conjunction with the garage building, and perhaps portions of the area identified as "Remnant #2" on the Hannem plan. It is not conceivable that in light of this usage, Mrs. Dilney would have contemplated the 2 acres being in an area of the property not, in some way, adjacent to the garage building. Accordingly, the 2 acres bequeathed to Mr. Dilny is to be in a location, within Lot 2002-2, which is at least in part, adjacent to Mr. Dilny's property identified as Civil No. 2282. There is nothing in the ordinary language utilized in the Will which would suggest that Mr. Dilny is not entitled to select, subject to the location the Court has previously identified, the 2 acres he wishes to be subject to the bequest, and he is entitled to identify and advise the Estate where he wishes the 2 acres to be located.

[26] What is the nature of the bequest - license or life estate? Looking at the ordinary meaning of the language utilized in the bequest, the Court is of the view

that the gift was intended to be in the nature of a life interest. The Court agrees with the proposition put forward by Mr. Dilny that the reference to a "transfer" and a right of way, are indicative of an interest beyond that contemplated by a license. Further, Mrs. Dilney specified that the gift was to continue until the happening of two potential events, death or cessation of the business. Both suggest a bequest beyond a license, which, if intended, would have been more clearly specified, with the right to terminate being reserved to the Estate.

[27] A related issue raised by Mr. Dilny is the validity of the condition subsequent contained in Clause 3, and in particular the words "until the business ceases operation". Undoubtedly such a provision could have been more specific, for instance identifying the nature of the business, or whether it is full or part time. However, the Court cannot agree, again in the context or this particular circumstance, that the clause is void for uncertainty. Mrs. Dilney wanted to provide assistance to her son in his business pursuits, and chose to delay the sale of 2 acres of her real estate and the ultimate distribution of proceeds relating to it among her children, to support his endeavours. There is nothing inherently uncertain in the bequest. The Court was provided with no authority to suggest that a life estate cannot terminate at a point in time, other than the death of the

beneficiary. It is open to the parties to submit, at any relevant time, that either condition is no longer being met. At present, and based on the evidence this Court heard, if asked, it would be readily determined that much of the area being occupied by Mr. Dilny is being used in active business pursuits. Nothing prevents the parties, should disagreement arise in future, from seeking a Court to determine whether Mr. Dilny is still utilizing the property for business purposes, and thus determine whether the life estate should continue, or terminate. It is further noted, that nothing in the clause, in the Court's view, requires that the business being undertaking by Mr. Dilny be confined to landscaping in order to comply with the condition of the life estate.

[28] To summarize, the Court determines as follows:

a) Mr. Dilny is entitled to a life estate in a single parcel of real property of 2 acres in area, and located within Lot 2002-2;

b) The life estate is to terminate upon the death of Mr. Dilny or earlier, if he ceases to use the property in question for business purposes; and

c) Mr. Dilny is entitled to select the location of the 2 acre parcel, however, it must be, at least in part, adjacent to his lot and the garage thereon, identified as civic number 2282 Route #4.

[29] At the request of both the Estate and Mr. Dilny, the Court has agreed to retain jurisdiction to address any further issues which may arise as a result of the determinations herein. The Court will also address the issue of costs, should the parties be unable to reach agreement.

J.