Date: 20020927
Docket: S.H. 157444

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: H.E.O.L. v. L.M.N., 2002 NSSC 217]

BETWEEN:

H. E. O. L.

PLAINTIFF

- and -

L. M. N.

DEFENDANT

D E C I S I O N

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

HEARD: **At Halifax before The Honourable Justice Walter R. E. Goodfellow September 23rd, 24th, 2002**

DECISION: **September 25th, 2002 (Orally)**

WRITTEN RELEASE OF ORAL: **September 27th, 2002**

COUNSEL: **H. E. O. L. and Mrs. L. L.- Self-represented**
David L. Parsons, Q.C. and Alan J. Stanwick - Solicitors for the Defendant

GOODFELLOW, J.: (Orally)

BACKGROUND

[1] N. M. L., born January *, 1910 married and her marriage was blessed with two children, L. N. and H. L.. N. L. and her husband were divorced and the two children were effectively raised by their mother in what appears to have been a close-knit family. L. married and has for many years resided in Sydney. She is now a widow with five grown children and H. L. has two grown children. His wife, L., was in attendance and participated throughout this trial.

[2] N. M. L. passed away August the 12th, 1997.

[3] N. L. executed a power of attorney appointing H. E. O. L., her son, and L. M. N., her daughter, as her lawful joint attorneys and this wide power of attorney incorporated the enduring power of attorney within the meaning of the *Powers of Attorney Act*, R.S.N.S. 1989, c. 352. This was executed by N. M. L. on the 25th of June, 1996.

[4] N. M. L. signed her last will and testament the 25th of June, 1996 appointing her son, H. E. O. L., and her daughter, L. M. N., as co-executors and co-trustees of her will and after a few specific items were disposed of, the residue was to be divided between the two children. N. M. L. executed documentation with the Bank of Montreal on November the 28th, 1996

establishing a joint account with H. E. L.. The bank records in evidence disclosed that this Bank of Montreal account, at the time it was designated as a joint account, contained $88,054.79 and as of December the 30th, 1996 held $109,367.46. On that day, the 30th of December there was a transfer of $100,000.00 to a joint guaranteed investment certificate in the amount of $100,000.00. The guaranteed investment certificate was cashed in March the 18th, 1997 and placed in a Bank of Montreal account in the name of H. L. only, the actual deposit being $100,616.44 and this was preceded on March the 7th, 1997 by Mr. L. transferring the balance from the joint account, $9,389.08 to his own personal account, giving it a total balance as of March the 18th, 1997 of $110,005.52. Subsequently, H. L. made withdrawals - June the 9th, 1997- $4,000.00; September the 5th, 1997 - $1,000.00; October the 10th, 1997 - $4,500.00; October the 10th, 1997 - $100,000.00 and a closing of the account October the 20th, 1997 - $1,090.22.

[5] There was also a CIBC account of something in excess of $60,000.00 and that account appears to be the only asset set out in the petition for probate.

[6] The initial action started by Mrs. N. was discontinued and Mrs. N. pursued the matter through probate court obtaining a show cause summons to Mr. L. to show cause why the $100,000.00 from the Bank of Montreal should not

be treated as an asset of the estate. Subsequently, there was an application on behalf of Mrs. N. for discovery of documents, several conferences by the court with counsel, and it was determined that all issues would be dealt with in this matter.

[7] The initial notice of trial was for the 17th, 18th, 19th and 20th of April, 2000 and finally this matter came on for hearing commencing September the 23rd, 2002.

[8] H. E. O. L. filed February the 21st, 2001 a notice dated the 18th of February, 2001 that he was no longer represented by A. Lawrence Graham, Q.C. and that he shall represent himself.

[9] The court inquired of Mr. L. in all of its telephone conferences as to whether he intended to obtain counsel and he was adamant that he did not intend to do so.

ISSUES

1. Is the Bank of Montreal account a gift to Mr. L. or an asset of the Estate of the late N. L.?

(a) Did N. L. possess the requisite mental capacity when she executed the documentation making the bank account at the Bank of Montreal joint on November 28, 1996?

(b) If N. L. is found to have possessed the requisite mental capacity to execute the documentation making the Bank of Montreal account joint, what was her intention at the time of execution?

2. If N. L. did make a gift of the Bank of Montreal account to H. L., should this gift be set aside on the basis of the doctrine of undue influence?

3. What amount of monies contained in the Canadian Imperial Bank of Commerce account should be subject to division between Mr. L. and Mrs. N.?

4. What amount of net rental income should be subject to division between Mr. L. and Mrs. N.?

5. Assuming that this Honourable Court finds that H. L. owes monies to his sister, L. N., should the conveyance by Mr. L. of his home and cottage to his wife be set aside?

ISSUE NUMBER ONE (a)

1. Is the Bank of Montreal account a gift to Mr. L. or an asset of the Estate of the late N. L.?

(a) Did N. L. possess the requisite mental capacity when she executed the documentation making the bank account at the Bank of Montreal joint on November 28, 1996?

EVIDENCE OF DR. E. B. JOHNSON

[10] Dr. E. B. Johnson, a family physician of considerable experience gave evidence and also confirmed his report of the 18th of June, 2000 which includes:

> First of all I would like to point our that I have been Mrs. L.'s family physician since the early 1960's except for a period from approximately 1982 to 1990 when she was cared for by other physicians, those being Dr. Victor Sterritt and Dr. Frank Lo. During the last 10 years of her life Mrs. L. suffered from:
>
> - hypothyroidism for which she was taking Synthroid, 0.075 mg daily.
>
> - chronic labile hypertension for which she was taking Vasotec (ace inhibitor) on a daily basis,
> - chronic osteoporosis of the spine for which she was taking Didrocal, a particular type of medication which contributes to very slowly reversing this process,
> - insomnia for which she took a hypnotic, Imovane 7.5 mg at bedtime when necessary,
> - chronic degenerative disease of the spine for which she took Motrin 400 mg 4 times a day on an as necessary basis and
> - chronic anxiety neurosis for which she took Ativan for her chronic anxiety and rare panic attacks.
>
> Throughout the early 1990's her general status was somewhat stable and on the average I saw her approximately 4 times per year in order to monitor her conditions and treat other minor health problems that arose in the interim.
>
> In early 1996, Mrs. L. began to act much differently than she had over the previous years that I attended her. She has always been a very anxious type of individual subject to anxiety attacks and panic states, however these were controlled with small doses of Ativan as I have previously stated. The changes

that occurred at this time noted by myself were that she was more anxious about her general health and felt that she had terrible problems and accused me of not telling her about the true state of her health. On these visits she was rather reluctant to leave and as 1996 progressed it was even more difficult to get her to leave my office after these visits.

On March 29, 1996 I note that I had not seen her for the previous 6 months. She had gone to Dr. Creighton in Dartmouth and was very upset because her blood pressure was extremely high and she was losing weight. I increased her medication and ordered investigative blood work, which were all normal when she was seen again 2 weeks later. Also her blood pressure had come back to normal.

On June 6, 1996 I again saw Mrs. L.. She was quite anxious and upset that day and did not know why she felt that way. Her blood pressure was relatively well controlled and I reassured her advising her to continue on with her previous medical routine. However, a few days later I received a call from her daughter,

Mrs. L. N., from Sydney who advised me that her mother was phoning her and advising her that Mrs. L.'s dead sister of approximately 20 years was sitting in her livingroom. When I saw her on June 14, I did not mention that L. had called since L. asked me not to mention this to her mother because she became very upset when questioned on these matters. I had a discussion with Mrs. L. and she indicated to me at that time that everything was okay. I recall mentioning to her at that time that if she continued to have problems that I would have a specialist see her, however, she adamantly refused to see anyone. I saw her on July 2nd, July 18th and July 30th. During this period of time I had received phone calls from her son or daughter-in-law regarding ongoing presence of her dead sister in the home and lack of recognition of a long time border. There was also fear at that time of her leaving the stove on in the house etc.

... I did not see Mrs. L. again until February 20, 1997. On that visit her blood pressure was extremely high and it did not come down on repeat testing. She was anxious, confused, depressed and paranoid. I did a mini mental status examination on her and found that she scored 17 out of 30. Incidentally, this was the last time that I saw Mrs. L.. I did receive copies of reports from Pamela V. Taylor, RSW, Senior Mental Health Services who saw Mrs. L. at her home on May 5, 1997 along with Dr. J. Walker and Dr. Dianne MacIntosh. At that time

Mrs. L.'s daughter-in-law, L. L., provided information to the above doctors and Ms. Taylor.

... In conclusion I would like to point out that Mrs. L. started showing signs of early dementia in the spring of 1996 and by the late winter of 1997 it had progressed to a moderately severe state.

... In conclusion it would be my opinion that in the fall of 1996 N. L.'s mental status would have been such that she lacked executive function and was far from being cognitively intact.

[11] Extracts from the report of Department of Community Services, Adult Protection Services, dated May the 5th, 1997:

Does the adult appear to be receiving adequate care and attention?

No. She is profoundly demented and locks the boarder/caregiver out as she often does not recognize him in the past 6 months. (I interject that this would take it back to November, 1996). She has lost a lot of weight, is leaving burners on (there have been two fires). She has several medical problems (high blood pressure, glaucoma, osteoporosis, hypothyroidism) and is non complaint with medicines, as well as forgetting to take them.

What is the mental and physical state of the adult insofar as it may affect the adult's capability to care for or to protect him/herself?

Advanced dementia affecting orientation to time and place, long + short term memory attention, activities of daily living and instrumental activities of daily living. Visual hallucinations distress her and cause her to call her son incessantly.

If mentally incompetent, please elaborate:

> She has no insight into her dementia and is refusing help in spite of it being offered. Memory is so poor that she could be taken advantage of by any unscrupulous person.

[12] It is noted that Dr. Johnson did a mini-mental examination the 20th of February, 1997 and Mrs. N. L. scored 17 out of 30 and when the Adult Protection Service had the test repeated in May of 1997 she scored 7 out of 30.

[13] The Honourable Judge Moira Legere, then of the Family Court for the Province of Nova Scotia, heard an application to have N. L. found to be an adult in need of protection pursuant to s.3(b)(ii) of the *Adult Protection Act* and granted the application by order the 11th of June, 1997.

[14] The conclusion I reach on this issue is based not only on the evidence, some of which I have recited from the professionals, but also I have had the benefit of the evidence of V.W., W.W. and R.R.. The evidence of Mr. R. and W.W. indicated episodes of bizarre conduct on the part of the late Mrs. L. and assisted me in the determination that Mrs. L. progressively suffered from dementia and that by the time of fall 1996 she lacked the capacity to execute any legal document. I am satisfied without reservation that she did not have the legal capacity or comprehension of what she was doing and, in particular, the change in the treatment of her children now advanced by H. L.

under the subterfuge and camouflage of the joint account authorization of November 28, 1996.

ISSUE NUMBER ONE (b)

1. Is the Bank of Montreal account a gift to Mr. L. or an asset of the Estate of the late N. L.?

(b) If N. L. is found to have possessed the requisite mental capacity to execute the documentation making the Bank of Montreal account joint, what was her intention at the time of execution?

[15] I have already concluded that Mrs. L. did not possess the requisite mental capacity. It is also clear that her conduct and course of action over the years was a clearly defined path consistent with one intention and one intention only, that is, for her two children at all times to share equally in her assets and estate.

[16] The law respecting joint bank accounts was addressed by the Supreme Court of Canada in *Niles v. Lake*, [1947] S.C.R. 291; 2 D.L.R. 248. This case involved a joint bank account between a daughter and mother which was contested by her four sisters and brother on the death of their mother claiming that it was an asset of their mother's estate. The joint bank account was on the Royal Bank of Canada standard form which was signed by the mother and the Defendants declared that all monies deposited to the credit of

the account to be their joint property and the property of the survivor of them. The mother executed a will 13 days after entering the agreement for the joint account. Taschereau, J. at p. 254 stated:

> The law is well settled, I think, that when a person transfers his own money into his own name jointly with that of another person, except in cases with which we are not concerned, then there is *prima facie* a resulting trust for the transferor. This presumption, of course, is a presumption of law which is rebuttable by oral or written evidence or other circumstances tending to show there was in fact an intention of giving beneficially to the transferee.
>
> ... All resulting trusts which arise simply from equitable presumption, may be rebutted by parol evidence: thus it may be shown that it was the *intention*, at the time of the purchase, of the person who advanced the purchase money, that the person to whom the property was conveyed or transferred either solely or jointly with such person should take beneficially ...
>
> ... All these authorities, as well as many others which it would be superfluous to cite here, clearly indicate that a mere gratuitous transfer of property, real or personal, although it may convey the legal title, will not benefit the transferee unless there is some other indication to show such an intent, and the property will be deemed in equity to be held on a resulting trust for the transferor.
>
> ... The words "shall be the joint property of the undersigned" or "right of survivorship" and "all monies in the account to be joint property of the undersigned" are indeed apt words to convey a legal title to the fund, but not to convey the whole fund beneficially. Something more than a mere transfer is required to destroy the presumption of a resulting trust and an intimation of such an intent must appear in the document itself, or as a result of evidence which reveals the intention to benefit the transferee.

[17] Rand, J. at p. 260 stated:

> Apart from the document, I see nothing in the facts to indicate any intention on the part of the testatrix to transfer to her sister a beneficial interest in the funds. The presumption arising upon such a voluntary transfer of property into another title or legal power, without more, is that of a resulting trust to the donor, and the burden is on those asserting a beneficial transfer to establish that fact.

[18] In *Re McKenna Estate* (1994), 134 N.S.R. (2nd) 218, Stewart, J. after determining that neither the testimony or signed agreements with the bank in and of themselves indicated any intention on the part of the deceased to create a joint tenancy in the monies deposited or to divest himself of his ownership and control of the deposited monies stated at p. 226:

> The bank documents have no bearing on the relationship between the joint tenants but only their relationship to the bank.

[19] There was substantial evidence in that case for Justice Stewart to make a finding that the purpose of the joint bank account was for convenience.

[20] I find as a fact not long before N. L. passed away H. L. suggested to his sister, L., a distribution of $100,000.00 of their mother's bank balance between them and offered to write her a cheque for $50,000.00. L. N.'s response was to the effect that this was her mother's money, that their mother was still alive and the money had to be left for her mother's needs first. This conversation occurred after November the 28th, 1996 and is

further proof to the overwhelming conclusion N. L. intended throughout that her children were to share equally. H. L. knew this and knew that his mother's signing a joint account authorization did not represent anything more by way of intention by their mother than that of a convenience at most. If I am in error on my conclusion, Mrs. N. L. did not have the mental capacity to comprehend as of November, 1997 and clearly H. L. would have known the joint account arrangement was not a change of intention by N. L..

[21] I do not for a moment accept H. L.'s rationalization that now suggests his mother intended to confer a benefit upon him to the exclusion of his sister.

ISSUE NUMBER TWO

2. If N. L. did make a gift of the Bank of Montreal account to H. L., should this gift be set aside on the basis of the doctrine of undue influence?

[22] In *Re Muttart Estate et al v. Jones* (1985), 137 N.S.R. (2d) 116, Bateman, J., as she then was, referenced the Supreme Court of Canada decision in *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353; 27 N.R. 241; 81 D.L.R. (4th) 211; 125 A.R. 81; 14 W.A.C. 81 the court addressed the relevant law, at p. 227:

> What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.

[23] There is nothing in the facts before me to indicate and I so find that there is no evidence on the part of Mrs. L. to transfer to her son, H. L., a beneficial interest in the Bank of Montreal bank account. Mrs. L. was in a vulnerable position at the time of executing the direction for a joint bank account on November 28, 1996. Following the directions given in *Re Muttart State et al v. Jones* above, it is clear Mrs. L. placed reliance upon her son. Her daughter resided in Sydney some distance away. Very clearly, particularly with her deterioration in mental and physical health, the potential for domination existed. I conclude on the evidence that L. N. has established not only the potential for domination in the relationship between Mrs. L. and her son but, in all the circumstances, actual domination, if one were to accept that the joint bank account was to be a preference conferred by Mrs. L. on her son. The threshold required for the presumption of undue influence

which applies in these circumstances would in itself, if necessary, direct that the alleged gift of the Bank of Montreal account to her son be set aside.

ISSUE NUMBER THREE

3. **What amount of monies contained in the Canadian Imperial Bank of Commerce account should be subject to division between Mr. L. and Mrs. N.?**

[24] It is clear from the records that the Bank of Commerce account was at least $60,000.00 and we have in evidence the attempt at an accounting by Mr. L. as co-executor. This indicates $60,000.00 which is acknowledged by both Mr. and Mrs. L. to be the CIBC account and accepting as I do the disbursements as being valid for proctor's fees and various expenditures in relation to the estate which together total $17,789.92, on his own accounting there would be from this bank account $38,510.08 for distribution. Included in this accounting is the allegation Mr. L. advanced to his sister, L. N., $6,000.00. The evidence establishes and Mrs. N. acknowledges receiving a cheque for $4,000.00 and she indicates adamantly that that is the total amount that she received. Mr. L. maintains that he paid her an additional $2,000.00 in cash and all I can say is that wherever there is any conflict between L. N., L. L. and H. L., I totally and completely prefer the evidence

of L. N. and as a result conclude that she received only $4,000.00 by way of an advance and therefore the amount which should be available for distribution related to the estate and the CIBC account is $40,510.08.

ISSUE NUMBER FOUR

4. What amount of net rental income should be subject to division between Mr. L. and Mrs. N.?

[25] We discussed this matter and there is now agreement that the accounting advanced by Mrs. L. contains some duplication in that some of the expenses were paid out of the CIBC account as indicated in the draft account filed by Mr. L. as a co-executor. The end result is that the net rental income subject to division is $10,288.94 and Mrs. N. is entitled to $5,144.47.

ISSUE NUMBER FIVE

5. Assuming that this Honourable Court finds that H. L. owes monies to his sister, L. N., should the conveyance by Mr. L. of his home and cottage to his wife be set aside?

[26] An application was made to this court to freeze the net proceeds of the sale of the property N. L. directed be divided equally between the children, H. and L.. In opposition to this application H. L. filed an affidavit he swore on the 4th of May, 1999 which included statements such as:

> 6. THAT at the time of executing her Will, my mother, N. L.'s estate consisted of real property situate at * and * * Road, in the City of Dartmouth, an account with the Bank of Montreal, Dartmouth Branch, for approximately $100,000.00, and a CIBC account for approximately $60,000.00
>
> 21. THAT I recognize that she has one half ownership of the CIBC account and that it is my intention to divide this account with her upon the resolution of the outstanding issues between the parties.
>
> 23. THAT at the time of the execution of this affidavit, I have an approximate net worth in excess of $240,000.00 consisting of real property, vehicles and various investments and am able to respond to any judgment issued by this Honourable Court respecting the within action.

[27] This court issued an order the 16th of June, 1999 permitting the equal distribution of the net proceeds but withheld $15,000.00 of H. L.'s share which funds are presumably on deposit in trust with the firm of Boyne Clarke, Mr. L.'s former solicitors. Mr. L. in every one of the pre-trial conferences and again in the court simply says, "sorry, no money left" and that it is because of his gambling and consumption of alcohol. In his May 4th, 1999 affidavit he swears that it was a falsehood to say that he had a gambling problem.

[28] The evidence is very clear from L. N. that she did not provide any funds or any consideration whatsoever for the conveyance to her the 12th of

September, 2000 from her husband, their camp or cottage property at * in the County of Lunenburg. Similarly, there was no consideration whatever for the conveyance by H. E. L. to L. L. on the same date his interest in the matrimonial home, * Drive, Dartmouth, Nova Scotia. Mr. L. conveyed his interest because he had a drinking and gambling addiction and he wanted to give priority to providing security for his wife. Phrased another way, he wanted to avoid the consequences of his greed and breach of trust.

[29] Mr. L. committed an egregious breach of trust and theft of his sister's entitlement in accordance with the intention of their late mother as set out in her last will and testament.

[30] Both H. L. and L. L. offer the only explanation for transfer of the properties to her is to avoid the consequences of his alcohol consumption and gambling. What they really mean is that they wanted to preserve the equity for themselves by the transfer to avoid an id defeat all creditors and consequences of the misconduct of H. L.. Mrs. N. is, of course, a major creditor that they obviously made every effort, including the attempt at conveying his interest in the two properties to his wife, L. L., to avoid meeting Mr. L.'s obligations to his sister.

SUMMARY

1. An order shall go forth ordering payment forthwith by H. E. O. L. to L. N. fifty per cent of the Bank of Montreal funds belonging to the estate which I have calculated as balance - $9,389.08; amount transferred from GIC to Mr. L.'s personal account - $100,616.44, a total of $110,005.52, one-half of which is $55,002.76 which shall carry pre-judgment interest at 4 per cent from the 1st of November, 1997.

2. H. L. shall pay the amount outstanding to L. N. in relation to the CIBC account a total of which after giving credit for expenses is $40,510.08; namely, Mrs. N.'s entitlement of $20,255.04 which shall bear pre-judgment interest from November the 1st, 1999 at 4 per cent.

3. H. E. O. L. shall pay to L. N. fifty per cent of the net rental income retained and utilized by Mr. and Mrs. L. personally, the total net rental income from the time of death to the sale of the property is acknowledged to be $10,288.94, one-half of which is $5,144.47 with pre-judgment interest from the 1st of January, 1999 at the rate of 4 per cent.

4. Boyne Clarke shall pay to L. N. the $15,000.00 plus accrued interest being held pursuant to the order of the 15th of June, 1999. The costs outstanding of that application shall be deducted and the net amount, $14,700.00, shall be credited to

the amount outstanding and payable by H. E. O. L. to L. N.. Mrs. N. will retain the accrued interest.

5. An order will go forth to the Bank of Nova Scotia, Tacoma Drive Branch, directing that the Bank of Nova Scotia shall make absolutely no further advances on the mortgage on the property, * Drive, Dartmouth, Nova Scotia, without further order of this court.

COSTS AND DISBURSEMENTS

[31] Having heard the parties on the matter of costs, I refer to *Gilfoy et al v. Kelloway et al* (2000), 184 N.S.R. (2d) 226. at p. 237:

> **[30]** It is the manner in which a proceeding is conducted and not whether a person was self-represented. If the court is faced with counsel who have conducted themselves responsibly and substantially shorten the proceedings, then that is a factor to be weighed. Similarly, if counsel take a particular approach which unnecessarily lengthens the proceedings or is repetitive and lengthens the otherwise reasonable duration of the proceeding, then these are the type of factors that are to be weighed in the exercise of judicial discretion in the taxation of costs.

[32] There is also the conduct of Mr. L. which could well have given rise to solicitor and client costs. *John Emil Aulwes v. Cheryl Lynn Mai (Standing) and Andrew David Mai* 2002 NSSC 204. The request based on Tariff 'A', scale 5 is very much appropriate and based on the amount involved of $80,000.00, H. E. O. L. shall pay costs to L. N. taxed and allowed in the

amount of $8,925.00 plus disbursements taxed and allowed in the amount of $8,291.31.

J.