SUPREME COURT OF NOVA SCOTIA
Citation: *Robitaille v. Robitaille Estate*, 2011 NSSC 203

Date: 20110527
Docket: Hfx No. 327095
Probate No. 58137
Registry: Halifax

Colette Robitaille

Applicant

v.

In the Estate of Helen Patricia Robitaille

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	June 3, 2010 in Halifax, Nova Scotia
Oral Decision:	June 3, 2010
Written Decision:	May 27, 2011
Counsel:	Bianca C. Krueger, for the applicant
	Sharron Atton, Registrar of Probate, for the Respondent

By the Court:

Overview

[1] This is an uncontested application, pursuant to s.8A of the *Wills Act*, RSNS 1989, c 505, for a declaration that "a writing" is valid and fully effective even though it was not executed in compliance with the formal requirements of the *Wills Act*. The applicant, who is both the executor and a beneficiary of the estate, argues that the testator intended to alter her will before she died and that this intention should be recognized even though the alterations were not properly witnessed.

[2] The application was heard on June 3, 2010. At the end of the hearing, I gave brief oral reasons and my findings allowing the application. I have agreed to provide more detailed reasons.

Background

[3] On or about November 12, 2009, the testator, accompanied by the applicant, met with her long-time lawyer to discuss amending her will following the death of her husband. The testator instructed that she wanted to have her co-executor amended to become an alternate executor because she was leaving the country and would not be available to act as a co-executor.

[4] The following day, the applicant phoned the lawyer and advised him that the testator wished to make a further amendment to her will to add a protective trust clause, governing the inheritance for one of her daughters, which would be similar to a provision already included for her son.

[5] The lawyer then spoke directly with the testator. The lawyer recognized the voice as the testator's having known her in a professional and personal capacity for a number of years. The testator instructed the lawyer to add a clause for one of her daughters that was identical to the clause already included for her son.

[6] The lawyer did not question the testator's motive for including this additional protective clause. The lawyer also did not make any inquiries into the mental capacity of the testator because such a determination would normally be made upon review and execution of the document. The lawyer assumed that he would see the testator again to execute the document.

[7] Unfortunately, shortly thereafter the testator became ill and was admitted to hospital. On or about November 27, 2009, the applicant contacted the lawyer and

asked that the revised will be sent to Halifax as quickly as possible, because her mother had been admitted to hospital and wished to sign the will as promptly as possible. The lawyer emailed the revised will to the applicant.

[8] The revised will included three changes: 1) removal of the testator's late husband as sole executor, 2) removal of one of the daughters as co-executor, and 3) addition of a protective trust clause with respect to the inheritance of one of the testator's other daughters. Other than these changes, the will was identical to the testator's previous will, executed January 8, 2009.

[9] On or about November 28, 2009, the lawyer resent the revised will because the applicant's surname had mistakenly been written as her maiden name rather than her married name. The testator signed the revised will before she passed away on December 2, 2009. However, the revised will was not witnessed at the time of the testator's signature. Instead, the witnesses added their signatures after the fact.

[10] Section 6(1) of the *Wills Act* requires that a will be in writing, and that the testator's signature "be made or acknowledged by the testator in the presence of two or more witnesses present at the same time." Section 6(1) also requires that

the witnesses attest and subscribe the will in the presence of the testator. This latter requirement did not occur, therefore, the revised will did not meet the formalities of execution proscribed by the *Wills Act*.

[11] On May 18, 2010, the applicant brought the underlying application for an order to enforce "a writing" pursuant s.8A of the *Wills Act*. The application was served on all of the other persons interested in the estate—the applicant's four siblings—in accordance with the *Probate Court Practice, Procedure and Forms Regulations*, amended to NS Reg 63/2010. None of these interested persons appeared before the court or provided any other indication that they opposed the application.

Issues

[12] This application raises the following issue: Whether the revised will is "a writing" that can be upheld as reflecting the intentions of the testator pursuant to s.8A of the *Wills Act*?

Analysis

[13] Section 8A of the *Wills Act* grants the court discretion to order that a writing is valid and fully effective even though it was not executed in compliance with the formal requirements imposed by the *Wills Act*. Section 8A reads:

> 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.

[14] This section of the *Wills Act* was introduced in 2006 as part of a significant amendment to the legislation. Those amendments also saw the recognition of holograph wills in Nova Scotia through the addition of subsection 6(2) of the *Wills Act*. These amendments were based closely on the Uniform Law Conference of Canada's *Uniform Wills Act*. Due to its relatively recent addition, s.8A of the *Wills Act* has received minimal judicial interpretation.

[15] In *MacDonald v MacDonald Estate*, 2009 NSSC 323, 52 ETR (3d) 237, the Court held that ss 6 and 8A of the *Wills Act* did not operate retroactively or

retrospectively; this finding is not relevant to the case at bar because here the revised will was executed well after the changes to the *Wills Act*.

[16] In *Hayward Estate (Re)*, 2010 NSSC 6, 86 RFL (6th) 171, the testator executed his last will and testament naming his wife as sole executor and beneficiary. Nine years later the testator and his wife divorced. A negotiated settlement agreement for the division of property did not refer to the will, and the testator did not revoke or make a new will before his death four years later. When the testator died, his ex-wife sought to enforce the will as against the couple's son. The Court considered whether the separation agreement was "a writing," pursuant to s. 8A of the *Wills Act*, and whether the agreement functioned to amend the testator's will notwithstanding the fact that the agreement was not executed in compliance with the formal requirements of the *Wills Act*. The Court held that the separation agreement was "a writing," but that it did not alter the testator's intentions in his will because the agreement made no reference to the will.

[17] The applicant cites two cases from outside Nova Scotia, which she submits are germane to the interpretation and application of s.8A of the *Wills Act*. I agree with the applicant that both cases are relevant when interpreting and applying s.8A

of the *Wills Act* given the similarity between s.8A and the legislative provisions at issue in each case.

[18] In *George v Daily* (1997), 115 Man R (2d) 27, 143 DLR (4th) 273 at 291 (CA) [*George*], the Manitoba Court of Appeal considered a similarly worded provision in that province's *Wills Act*. The Court held that it was necessary to focus on testamentary intention when considering whether a writing that did not comply with the formalities for execution should nonetheless be deemed valid and effective. The Court stated, at 291:

> The term "testamentary intention" means much more than a person's expression of how he would like his/her property to be disposed of after death. The essential quality of the term is that **there must be a deliberate or fixed and final expression of intention as to the disposal of his/her property on death** [emphasis added].

[19] In *Furlotte v McAllister*, 2005 NBQB 310, 19 ETR (3d) 282 [*Furlotte*], the deceased passed away apparently intestate. At some point thereafter the children of the deceased found a piece of paper in her possessions that included testamentary instructions. The paper was written in the deceased's hand writing, but it was not a holograph will. In any event, the paper went missing. One of the children reproduced the document from her best recollections.

[20] Initially, some of the siblings contested reliance on the document, though ultimately none of them appeared before the Court. The issue before the Court was whether the reproduced document was a writing that should be valid and effective despite its non-compliance with the formal requirements of execution as well as the somewhat odd circumstances in which it was produced.

[21] New Brunswick has a provision in its *Wills Act* that is similar to Nova Scotia and Manitoba; consequently, the Court considered and applied the test outlined in *George*. The Court noted that the document included reference to detailed funeral arrangements, that it was found near an unused "home will" kit, that it dealt with specific items for disposition some of which the deceased had discussed with her children, and that in some cases the deceased had actually started to dispose of property as noted. The Court also noted that the other siblings had not filed any materials to support their intentions to contest. The Court concluded that the reproduced document reflected the deceased's final wishes about the disposition of her estate and that it was valid and effective.

[22] At the hearing of this application, I raised, on my own motion, the issue of testamentary capacity. The lawyer who prepared the will never questioned the testator on the issue of capacity because he received his final instructions over the phone and his normal practice was to do so when the will was executed. Where a will complies with the formalities of execution and was reviewed by the testator, there is a rebuttable presumption of testamentary capacity (*Willis Estate (Re)*, 2009 NSSC 231, 51 ETR (3d) 304; *Vout v Hay*, [1995] 2 SCR 876, 7 ETR (2d) 209).

[23] Should the same rebuttable presumption apply in the context of a writing that does not comply with the formalities of execution? In my view, the same rebuttable presumption should apply to a writing that a party seeks to enforce as valid and effective.

[24] I see no principled reason why “a writing” should be treated differently simply because it does not comply with the formalities of execution. This is not to say that the circumstances in which the writing is prepared cannot raise the “suspicious circumstances” necessary to extinguish the presumption.

[25] Further, s 6(2) of the *Wills Act* recognizes the validity of holograph wills in appropriate circumstances. Holograph wills, by their very nature, do not comply with the formalities of execution; nonetheless, the *Wills Act* recognizes their validity. In *Anderson Estate (Re)*, 2009 ABQB 285, 2009 CarswellAlta 803 at para 35 (WL Can), the Court held that the rebuttable presumption applied to what was, "in essence, a holograph will."

[26] In this case, there are no parties contesting the writing or raising the issue of "suspicious circumstances." The testator gave instructions to her lawyer in-person and over the phone. She then signed the document shortly before she died. I am satisfied that the rebuttable presumption applies in the circumstances of this case. Thus, it is not necessary to comment further on the issue of the testator's capacity.

[27] In order to order that a writing is valid and effective, I must be satisfied that the testator's revised will represents a deliberate or fixed and final expression of her intention to dispose of her property on death. In my view, the circumstances of this case support the conclusion that the revised will does meet this test, and that the writing should be enforced as a valid and effective will even though it was not properly witnessed.

[28] The revised will in this case was substantially similar to a pre-existing will. The testator recognized the need for amendments to her previous will as a result of her husband's death and the likelihood that one of her children would not be able to take up the responsibility of being a co-executor. Thus, she began the process of amending her will, but became ill and was hospitalized before she had the opportunity to properly execute the will.

[29] The protective trust provision that was added with respect to one of the beneficiaries might in some circumstances raise a red flag. However, in this case, the added provision was identical to a provision in the pre-existing will that applied to another of the beneficiaries. Further, the beneficiary against which this provision applies has not contested its validity. In fact, none of the other beneficiaries, who were all served with this application, filed any notice to contest the application.

[30] When compared to the circumstances in *Furlotte*, where the Court enforced the writing, the circumstances surrounding the revised will in this case much more strongly support a conclusion that the writing should be enforced.

Conclusion

[31] In these circumstances, it is clear that the revised will represents a deliberate or fixed and final expression of the testator's intention to dispose of her property on death as specified in the revised will. In all likelihood, if the testator's health had not rapidly deteriorated over what was approximately a two-week period, the revised will would have been executed in compliance with the formalities of the *Wills Act* and this application would not have been necessary. Therefore, this application is allowed, and the writing at issue is deemed valid and fully effective pursuant to s. 8A of the *Wills Act* as if it had been executed in compliance with the formal requirements imposed by the Act.

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LeBlanc, J.