SUPREME COURT OF NOVA SCOTIA

Citation: Jollimore Estate v. Nova Scotia (Public Archives) , 2011 NSSC 218

Date: 20110720
Docket: Hfx No. 335260
Registry: Halifax

Between:

The Canada Trust Company, Personal Representative and Trustee of the Estate of Roberta Jollimore

Applicant

v.

Public Archives of Nova Scotia, Estate of Gregory Jollimore, Hazel Moore, Harold Brownhill, Eugenie MacLeod, Basil Brownhill, and Zero Population Growth of Canada, Inc.

Respondents

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	May 20, 2011, in Halifax, Nova Scotia
Final Written Submissions:	June 2, 2011
Written Decision:	July 20, 2011
Counsel:	Richard S. Niedermayer and Tanya L. Butler, for the Applicant Edward A. Gores, Q.C., for the Public Archives of Nova Scotia Loretta M. Manning, for the Estate of Gregory Jollimore Brian F. Forbes, Q.C., for Hazel Moore, Harold Brownhill and Eugenie MacLeod Shawn A. Scott, for Basil Brownhill

Coughlan, J.:

[1] Roberta Jollimore lived with her son, Gregory Ross Jollimore, at Halifax, Nova Scotia. They were devoted to each other. Mrs. Jollimore suffered from Parkinson's disease.

[2] On May 22, 2008, a co-worker of Mr. Jollimore concerned that he had not been at work since May 16, 2008 called the police. The police investigated. The Jollimore residence was secure. Returning to the residence the next day, after making inquiries, the police arranged for the Fire Department to break the lock on the front door of the residence. Police officers entered the house and discovered a deceased male lying in the first room to the right as you enter from the street.

[3] The male was later identified as Mr. Jollimore, The body was wearing indoor clothing with a plastic bag over the head. Inside the bag was a can of "Quick Start". Near the body was a handwritten note which read, "Please bury my beloved mother next to me. No plots purchased yet. Use funds in my account. G.J." Nearby was a last will and testament and banking documents.

[4] Upon further investigation, the body of a deceased female, later identified as Roberta Jollimore, was found in the basement. Mrs. Jollimore's body was discovered prone, covered with a blanket, with her head resting on a bible and a number of stuffed animals and a driver's license arranged around her head. A man's leather belt, size 36, was found snugly around her neck, with the buckle in the back.

[5] Autopsies were conducted on Mrs. Jollimore and her son.

[6] The Chief Medical Examiner of Nova Scotia, Matthew J. Bowes, MD, FRCPC, is of the opinion the cause of Roberta Jollimore's death was ligature strangulation. The position of the body and scene of her death caused Dr. Bowes to be of the opinion Mrs. Jollimore was murdered. The residence being secure and no evidence of a robbery or a struggle, Dr. Bowes concluded Gregory Jollimore killed Mrs. Jollimore. It was Dr. Bowe's opinion Gregory Jollimore's death was caused by asphyxia due to suffocation, which was self-inflicted.

[7] I find Roberta Jollimore was killed by Gregory Jollimore.

[8] That no one can benefit from his own wrong has long been established in law. If a person kills another, he or she cannot receive the other's property, either under a will or on an intestacy. In *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147 (C.A.), Lord Esher, M.R. stated at p. 152:

> ... That the person who commits murder, or any person claiming under him or her, should be allowed to benefit by his or her criminal act, would no doubt be contrary to public policy. But this doctrine ought not to be stretched beyond what is necessary for the protection of the public.

[9] This principle has been affirmed by the Supreme Court of Canada in *Lundy v. Lundy* (1895), 24 S.C.R. 650 and *Nordstrom v. Baumann*, [1962] S.C.R. 147.

[10] There is an exception to the general rule. If it can be established the person who killed another is of unsound mind, the person is not disqualified from taking a benefit from the estate of the person he or she killed. The onus is on the person claiming on behalf of the person who killed the other. (In *re Pollock: Pollock v. Pollock*, [1941] 1 Ch. 219)

[11] In this case there is no evidence Gregory Jollimore was of unsound mind. Therefore, Gregory Jollimore, or those claiming through him, cannot benefit from Roberta Jollimore's will.

[12] Roberta Jollimore made a last will and testament dated March 20, 1992. A grant of probate of Mrs. Jollimore's will was issued July 10, 2008 to the Canada Trust Company. The will contained the following provisions:

> 1. I appoint my son, Gregory Ross Jollimore, or, if he has predeceased me or is unable or unwilling to act, Canada Trust Company of Halifax, Nova Scotia, to be the executor of my will.
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> . . . .
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> 4. I give all of my estate, both real and personal and wheresoever situated to my son, Gregory Ross Jollimore.
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> 5. If my son, Gregory Ross Jollimore has predeceased me I give all of my estate, both real and personal and wheresoever situate to the Public Archives of Nova Scotia.

[13] As Gregory Jollimore and those claiming under him cannot benefit from Mrs. Jollimore's estate, the question arises as to whom is entitled to the estate.

[14] Hazel Moore, Harold Brownhill, Eugenie MacLeod and Basil Brownhill (heirs), the sisters, brother and nephew of Mrs. Jollimore, submit the gift to the Public Archives of Nova Scotia was subject to the condition precedent that Gregory Ross Jollimore predecease Mrs. Jollimore. As Mr. Jollimore survived Mrs. Jollimore, the condition precedent has not occurred and an intestacy takes place. In the event of an intestacy, they are entitled to the estate.

[15] The Public Archives submits it is not certain as to whether Mr. Jollimore predeceased Mrs. Jollimore. Section 3(3) of the *Survivorship Act*, R.S.N.S. 1989 c. 454 provides:

> **(3)** Where
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> . . . .
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> (b) the will contains provisions for the disposition of the property in case that person had not survived the testator or died at the same time as the testator or in circumstances rendering it uncertain which survived the other,
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> then for the purpose of that disposition the will takes effect as if that person had not survived the testator or died at the same time as the testator or in circumstances rendering it uncertain which survived the testator or died at the same time as the testator or in circumstances rendering it uncertain which survived the other, as the case may be.

[16] If the Court is unable on the evidence to determine the order of death, Mrs. Jollimore's will takes effect as if Mr. Jollimore had predeceased her.

[17] In the alternative, the Public Archives submits if it is determined Roberta Jollimore predeceased Gregory Jollimore, the gift to Mr. Jollimore being void for reasons of public policy, the gift to the Public Archives ought to be given effect.

[18] Did Roberta Jollimore predecease Gregory Ross Jollimore? In his report of March 15, 2011, Dr. Bowes stated:

> **Gregory Jollimore died after Roberta Jollimore.** A number of facts point us to this conclusion. The scene of RJ's death has been altered, with a small shrine of stuffed animals placed around her head and a blanket placed on top of her. The blanket in particular could not have been placed prior to her body having been placed in that position . There is no evidence that RJ made any purposeful movement after her body was placed in the position in which it was found. Because the residence was secure, the only person who could have arranged the scene around RJ's body was GJ. Thus, the scene around RJ's body gives strong evidence that GJ was capable of relatively complex, purposeful movement after RJ has been killed. Since the scene of GH's death is in a different part of the house than his mother, GJ must have been capable of locomotion after his mother's death. The apparatus that GH used to take his own life is discussed above: noteworthy here is that it would take time and a number of purposeful movements to arrange and then deploy the suicidal apparatus. For argument's sake, one could imagine the papers and note being prepared before the assault on RJ, but the plastic bag with its canister of ether and tight seal around the neck could only have been prepared after the assault. In any case, ether is found in GJ's blood, providing further proof that the can of ether was deployed while inside the bag with GJ's head.

and in his report of April 26, 2011, Dr. Bowes stated::

> The possibility that RJ had a short period of agonal vital function after she was strangled is not excluded, but given the abundant evidence of Gregory Jollimore's (GJ) purposeful activity following the strangulation, and given the frail health of RJ, it is exceedingly unlikely that this period was longer than a few minutes. In any case, this hypothetical period of agonal vital function could not have been so long that it exceeded the time it took for GJ to kill RJ, arrange her death scene, walk upstairs, arrange his death scene, construct and deploy the suicide device, and then expire of asphyxia himself, a death that also may have included a period of agonal vital function.

[19] I accept Dr. Bowes' opinion as to the order of death and find that Roberta Jollimore predeceased Gregory Ross Jollimore. Having made that determination, the provisions of s. 3 of the *Survivorship Act, supra*, do not apply.

[20] Is the gift in Mrs. Jollimore's will subject to a condition precedent and therefore fails as Mr. Jollimore survived Mrs. Jollimore?

[21] Various approaches have been taken by Canadian courts where a beneficiary cannot take under a will for reasons of public policy by reason of murdering the testator and a condition precedent exists, which had not occurred, to the alternate beneficiary receiving an interest in the estate.

[22] In *Dhaliwall v. Dhaliwall*, [1986] 6 W.W.R. 278, 30 D.L.R. (4th) 420, 23 E.T.R. 271 (B.C.S.S.), the will provided the testatrix's property go to her husband (the murderer) and, if he predeceased her, to their children. The husband was deemed to have predeceased the testatrix. Southin, J., as she then was, stated at para. 32:

> The court should do its best to see, in a matter of this kind, that the obvious intentions of a testator are not defeated. The proposition that there should be an intestacy because the will uses the words "if X survives" and X did survive results not only in the testator suffering the indignity of murder but also the affront of the defeat of his obvious testamentary intention. If the gift is a residuary gift and there is a gift over, less violence is done to the testator's intentions if the court holds that a person barred by the rule of public policy is deemed to have died immediately before the testator than by any other possible solution to this problem. I, therefore, adopt that solution and I decline to follow *Re Robertson*.

[23] In *Brissette Estate v. Brissette*, 1991 CarswellOnt 539, 42 E.T.R. 173, a decision of the Ontario Court of Justice, the testatrix left the residue of her estate to her husband (the murderer), and if he predeceased her or did not survive her for thirty days, the residue went to various persons named in the will. Morin, J., in attempting to ascertain the testatrix's intention when she executed the will, found there was an implied condition that her husband had to be a legal beneficiary. The husband was disentitled by reason of public policy. To give effect to the testatrix's intention, the estate should go to the alternative beneficiaries named in the will. Morin, J. considered this approach the least intrusive method of carrying out the testatrix's intentions, stating at paras. 11 and 12:

> In the circumstances of this case, I must ask what were the testatrix's intentions at the time she executed her will. Her intention was first to benefit her husband, in that he would be the beneficiary of her estate. Were there any conditions to his being a beneficiary? Yes. He had to be living at the time of her death, and he had to survive her for 30 days. Are those conditions satisfied? Yes. Were there any other conditions before her husband could take? Yes. He had to be a *legal beneficiary*. In this case, because her husband murdered her, he

> disentitled himself, this being public policy and operation of law. He did not, however, disentitle innocent third parties. His murderous act cannot prejudice or injuriously affect the rights of those persons who have independent rights from the husband, his assignees, those claiming through him, or his estate.
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> In my view, as Lord Esher M.R. clearly states, what happens to that portion of the residue which would have gone to the husband remains in the testatrix's estate and is distributed according to any alternate intentions of the testatrix *if there are any*. To do otherwise, would ignore the true intentions of the testatrix, that the alternate beneficiaries are to benefit, where the primary beneficiary cannot because of natural causes, or a condition precedent, or by operation of law. This approach satisfies where possible the public policy of avoiding intestacy where at all possible. Also, this approach is the least intrusive method of carrying out the intentions of the testatrix; in other words, it is the least manner of violating the testatrix's last will and testament.

[24] In *Re Bowlen Estate*, 2001 A.R. 100 (Alta. Q.B.), the testators' will provided the estate went in equal shares to their son and daughter, with a gift over to the children of any child who predeceased them. The daughter was convicted of killing the testators and LoVecchio, J., adopting a literal approach, found there was a partial intestacy as the gift to the daughter's children was contingent in their mother's death, which had not taken place. LoVecchio, J. stated at paras. 57, 61 and 62:

> The will of James Bowlen is clear. If his spouse predeceased him, he wished to have his estate divided equally between his children with provision for that interest to pass to his grandchildren in the circumstances enunciated. The grandchildren were to benefit only if his daughter predeceased him and that has not happened. This would also seem to indicate a general intent to provide Catherine Bowlen or her children with one-half of his estate and Robert Bowlen or his children with the other half of his estate albeit the gift over to the grandchildren is subject to one very specific condition which is not satisfied.
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> . . . .
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> When I contrast ***Dhaliwall*** and ***Brissette***, I note that there is no true difference between the "deemed death" approach and the "implied intention" approach. In both cases, the court simply gives effect to any "gifts over" contained in the will which may have been frustrated by the fact that the murderer outlived the testator. The condition precedent (the murderer's predeceasing the testator) to the "gift over" is waived, either by deeming the murderer to have

> predeceased the testator or by simply viewing the "gift over" as the testator's true intention notwithstanding the failure of the murderer to predecease the testator.
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> There are, therefore, two approaches for me to choose from. On the one hand, I may follow a strict, literal interpretation of the will. Using that approach, I would find that the gift over to the grandchildren fails because it is contingent upon their mother's death. On the other hand, I would take a more interventionist approach to the construction of the will. Using this approach, I would find that the intention to benefit the grandchildren also applied where Catherine Bowlen was disqualified by law from taking her share of the estate.

[25] What is the approach to take in interpreting Mrs. Jollimore's will?

[26] The objective of a court in interpreting a will is to determine the intention of the testator. In *Feeney's Canadian Law of Wills*, (4th ed.), the objective is described at s. 10-1:

> In interpreting a will, the objective of the court of construction should be to determine the precise disposition of the property intended by the testator. The court should attempt to ascertain, if possible, the testator's actual or subjective intent as opposed to an objective intent presumed by law. The court should be concerned with the meaning that the particular testator attached to the words used in his or her will rather than with a hypothetical standard that might be that of an average or reasonable person. This approach requires the court to consider the testator's peculiar and unique use of language, all the circumstances surrounding his or her life and all the things known to him or her at the time he or she made his or her will which might bear on the type of dispositions he or she actually intended to make by the will. ...

[27] The role of a court in interpreting a will was set out by Laidlaw, J.A., in giving the majority judgment in *Re Burke*, [1960] O.R. 26, 20 D.L.R. (2d) 396 (Ont. C.A.) at para. 5:

> The Court is now called upon to construe a particular document and, at the outset, I emphasize what has been said before so frequently. The construction by the Court of other documents and decisions in other cases respecting the intention of other testators affords no assistance whatsoever to the Court in forming an opinion as to the intention of the testator in the particular case now under consideration. Other cases are helpful only in so far as they set forth or explain any applicable rule of construction or principle of law. Each Judge must endeavour to place himself in the position of the testator at the time when the will was made. He should concentrate his thoughts on the circumstances which then

> existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give due weight to those circumstances in so far as they bear on the intention of the testator. He should then study the whole contents of the will and, after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator. When an opinion has been formed as to that intention, the Court should strive to give effect to it and should do so unless there is some rule or principle of law that prohibits it from doing so.

[28] This statement as to how a court should perform its function was approved by Chipman, J.A., in giving the Court's judgment, in *Re Murray Estate*, 2001 NSCA 25.

[29] In giving the Court's judgment in *Re O'Brien* (1978), 25 N.S.R. (2d) 262 (N.S.S.C.-A.D.), Cooper, J.A., in addressing how a court should go about interpreting a will, stated at para. 4:

> Authorities which set out the rules which should be followed in interpreting a Will are referred to in the decision of the trial judge. I add to, or supplement, them by reference to *Re Kirk* (1956), 2 D.L.R. (2d) 527 (Ontario High Court), where Kelly, J., said at p. 528:
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> > 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.

[30] As stated, the first duty of the Court is to ascertain the intention of the testator from the language in the will. However, we know some of the language of Roberta Jollimore's will does not apply by operation of law - the gift to Gregory Jollimore cannot take effect.

[31] For reasons of public policy, Gregory Ross Jollimore cannot benefit from his mother's estate. Therefore, to ascertain Mrs. Jollimore's subjective intent, in the circumstances Gregory Ross Jollimore has to be removed from consideration.

[32] What was Mrs. Jollimore's actual or subjective intention? It was that her son, Gregory Ross Jollimore, would receive her estate upon her death and if Mr. Jollimore did not receive her estate, the estate was to go to the Public Archives of Nova Scotia. Mrs. Jollimore used words to express her intention. She would not say if my son predeceases me or kills me then the estate should go to the Public Archives. It would not be in her contemplation her son - her beneficiary - would kill her. Mrs. Jollimore would not use words to limit the gift to Gregory Jollimore other than if he predeceased her, as she did in the clause appointing her executor, as she would want her estate to benefit her son if he was disabled.

[33] Mrs. Jollimore's will was straight forward - if Gregory Jollimore did not receive her estate, it was to go to the Public Archives. No other parties were mentioned. To use the words, "If my son, Gregory Ross Jollimore has predeceased me", in the circumstances of this case to find an intestacy would completely ignore Roberta Jollimore's wishes.

[34] The residue of Roberta Jollimore's estate is to go to the Public Archives of Nova Scotia.

[35] If the parties are unable to agree, I will hear them on the issue of costs.

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Coughlan, J.