SUPREME COURT OF NOVA SCOTIA
Citation: *Thimot v. Amero Estate*, 2019 NSSC 372

Date: 20191212
Docket: ANN473464 (AR5764)
Registry: Halifax

Between:

Yvette Thimot

Applicant

v.

Estate of Robert Wayne Amero

Respondent

DECISION

Judge: The Honourable Justice Patrick J. Duncan

Heard: May 7, 2019, in Annapolis Royal, Nova Scotia

Counsel: Ronald Richter, for the Applicant
Hugh Robichaud, for the Respondent

By the Court:

[1] Robert Amero died testate in Annapolis County, Nova Scotia, on July 26, 2015. His daughter, Pataches Dianne Amero Desrochers, was named as the sole Executrix and Trustee of his Will. She applied for and on August 18, 2015, received a grant of probate of the estate.

[2] On December 15, 2015, Yvette Thimot filed a Notice of Claim against the estate, seeking $58,400 for the following:

1. A claim for capital improvements to the matrimonial home pursuant to the terms of the Will and a Cohabitation Agreement;
2. Rent owing for a garage facility pursuant to the terms of the Will; and
3. Payment for moose meat that was removed from garage.

[3] The Estate filed a Notice of Contest to the Claim on January 7, 2016.

[4] Ms. Thimot filed a Notice of Application on February 21, 2018, pursuant to s. 64(3)(a) of the *Probate Act*, by which she seeks to have her claims against the Estate determined. Some agreements have been reached but there remains a discrete point of dispute that needs to be resolved. That question is whether the Estate is entitled to receive, from Ms. Thimot, an amount equivalent to the proceeds of a life insurance policy that paid out a loan which encumbered Mr. Amero's 2014 GMC Sierra truck at the time of his death.

[5] The parties filed an agreed statement of fact which states:

1. The Estate of Robert Amero as represented by Pataches Desrochers in her capacity as Personal Representative (hereinafter referred to as the "Estate") agree that the Applicant Yvette Thimot (hereinafter referred to as "Thimot") has a claim against the Estate.
2. It is agreed that the value of Thimot's contribution to the home and real property located at 638 Arlington Rd., Hampton, NS (hereinafter referred to as the "Property") is $30,000.
3. It is agreed that Thimot is entitled to the proceeds of life insurance through Industrial Alliance Insurance Company in the amount of $4,622.22.
4. It is agreed that Thimot owes the Estate the sum of $500 as the value of household contents received from the Property.

5. It is agreed that Thimot received $940 in Canada Pension Plan and Old Age Security payout which are the property of the Estate and that Thimot owes the Estate $470 as a reimbursement of these benefits.

6. The Grant of Probate for the Last Will and Testament of Robert Wayne Amero was issued on August 18, 2015. A copy of the Grant of Probate with Will attached is attached hereto as appendix A.

7. Thimot and Robert Wayne Amero commenced residing as common-law partners in 2008 in the Property and continued to so reside as common-law partners until the death of Robert Wayne Amero on July 26, 2015.

8. Thimot vacated the Property in December 2015 and has released her right to reside in the Property which right was granted to her by the cohabitation agreement.

9. On or about November 2, 2009, Robert Wayne Amero and Thimot entered into a cohabitation agreement. A copy of this cohabitation agreement is attached hereto as appendix B.

10. On or about December 20, 2013, Robert Wayne Amero purchased a new 2014 GMC Sierra half ton truck from Cornwallis Chevrolet Buick GMC for a total payment of $47,433.60 of which $40,892.07 was paid by a loan from the Bank of Nova Scotia. Attached hereto as a appendix C is a copy of the credit agreement for the above referred to truck loan.

11. The truck loan referred to in paragraph [10] above was insured on the life of Robert Wayne Amero. Subsequent to the death of Robert Wayne Amero First Canadian Insurance Corporation paid out the truck loan referred to in paragraph [10] by payment to the Bank of Nova Scotia of the amount of $31,903.43. Attached hereto as appendix D is a copy of a letter dated September 29, 2015, from First Canadian Insurance Corporation confirming the payment of the truck loan referred to in paragraph [10] in the amount of $31,903.43.

12. It is agreed that Thimot received ownership of the truck referred to in paragraph [10 and 11] without any encumbrances of the Bank of Nova Scotia loan and subsequently sold the truck.

(Paragraphs 11 and 12 of the Agreed Statement of Fact contained incorrect references to related paragraphs. The numbers inserted in brackets are corrections.)

[6] The documents attached as appendices to the Agreed Statement of Fact form part of the evidence in this matter.

[7] The position of the Estate is that Ms. Thimot is liable to the Estate for the amount of the "outstanding debt" on the truck at the moment prior to Mr. Amero's death, being $31,903.43. In essence it says that what Mr. Amero intended was for

her to have the benefit of the equity in the truck at the moment just prior to his death, not after his death at which point the pay out of the loan to the Bank crystallized. Thus, in its submission, Ms. Thimot could not take the benefit of the insurance payout when the truck was transferred to her.

[8] The issue stems from the Estate's view of the operation of law together with the language of Paragraph Third, subparagraph (b), clause (iv), which directed the Trustee:

> To transfer, convey and deliver to Yvette my truck (subject to any outstanding debt)…

[9] The Estate relies upon s. 23 of the *Wills Act* which states:

> Every Will shall be construed with reference to the real and personal property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the Will.

[10] It has been submitted that this provision is to be interpreted as if the vehicle was transferred to Ms. Thimot prior to Mr. Amero's death. Since the loan was still outstanding at that point, the Will must be interpreted to mean that she owes the Estate the amount of the outstanding debt.

[11] I have been urged to find no ambiguity in the language of the Will and accept the Estate's interpretation that no contrary intention is indicated. Implicit in this argument is that the remedy sought by the Estate would have been what Mr. Amero intended.

[12] I have been referred to the case of *Re: Hicknell*, (1981) 128 DLR (3d) 63, as offering support for the Estate's position. In that case, the testator devised his house to his common-law wife and left the residue of his estate to his lawful children. The house was encumbered by two mortgages. Prior to his death, the testator had arranged for a Family Income Benefit rider to his life insurance policy. He made oral statements the he intended it to provide funds for the monthly mortgage payments after his death.

[13] After the testator's death, the executor let the mortgages fall into arrears and did not convey the house to the devisee. The latter brought an application for an order directing the executor to pay the outstanding arrears on the mortgages from the proceeds of the life insurance policy or, in the alternative, for an order

requiring the executor to convey the house to the devisee with the mortgages in good standing. The court dismissed the application.

[14] The court concluded that having regard to the Ontario legislation in effect at the time a devisee of an interest in real property which is subject to a mortgage is primarily liable for the payment of the mortgage unless the testator has by Will, deed or other document signified another intention. Such intention must be expressed in the document itself. Neither the life insurance policy or the Family Income Benefit rider did so.

[15] Section 22 of the *Succession Law Reform Act* of Ontario is of similar effect to section 23 of the Nova Scotia *Wills Act*. The Ontario legislation provided that in the absence of a contrary intention appearing in the Will, the Will speaks and takes effect "as if it had been made immediately before the death of the testator" with respect to the property of the testator.

[16] The court, in *Hicknell*, concluded that in the absence of an express contrary intention, the beneficiary is deemed to take the devise under the Will effective as of the time of death. That meant that the beneficiary could only acquire the same interest in the home as the testator had at the time of death, being the equity of redemption in the property. The responsibility for mortgage payments thereafter which would fall on the beneficiary. It was determined that those payments were not the obligation of the estate to pay out of other assets of the estate, in the absence of the testator's expressed intent to do so.

[17] The facts are quite different than those in this case. The testator had a life insurance policy with a rider that provided for the payment to the beneficiary of the policy of a monthly amount for a period of 25 years following the death of the insured. The beneficiary was the estate. The life insurance agent who contracted with the testator indicated that the deceased expressed an intention that the amount paid under the Family Benefit Rider could look after the mortgage payments. That intention however was not included in the life insurance policy. Neither did the Will express such an intention.

[18] The decision turned on the interpretation of s. 32 of the Ontario *Succession Law Reform Act* which addressed, specifically, the circumstances when real property of the testator is devised subject to a mortgage. The legislation required a specific "document" to demonstrate that the testator intended that the insurance policy payable to the Estate was to be used pay the mortgage. Since there was no such document the statutory requirement was not satisfied.

[19] Besides the fact that the matter before this court does not involve real estate, nor a statutory direction, it is also readily distinguishable in that the Estate of Mr. Amero was not asked to pay the balance of the truck loan out of other estate assets, as was being requested in the Ontario case. For these reasons I do not find the *Re Hicknell* case to be of assistance.

[20] The question then is how the bequest should be interpreted.

[21] In the case of *Re Peters*, 2007 NSSC 103, Goodfellow J. stated that:

> Rules of Construction
>
> 11 The paramount and overriding rule in the construction of a Will is to determine the intention of the testator and when that intention is clear it shall prevail. Intention, where it is clear, trumps the presumption of early vesting.
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> 12 In the Supreme Court of Canada case *Merchants Bank v. Keefer* (1885), 13 S.C.R. 515 (S.C.C.), Henry J. said at p. 539:
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> > A construction which gives a vested interest is, no doubt, favored by the courts where there is ambiguity or doubt, but where the intention to create a contingent estate or interest is reasonably evident or clear that intention must be respected and carried out. In this case the condition precedent to the vesting, that is, that Thomas shall be then living is, I think, clearly expressed, and we cannot treat it as a devise creating a vested interest without going in opposition to the terms of the Will.
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> 13 In *National Trust Co. v. Fleury* (1965), 53 D.L.R. (2d) 700 (S.C.C.), Ritchie J., stated at p. 710:
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> > In the construction of Wills, the primary purpose is to determine the intention of the testator and it is only when such intention cannot be arrived at with reasonable certainty by giving the natural and ordinary meaning to the words which he has used that resort is to be had to the rules of construction which have been developed by the Courts in the interpretation of other Wills. It is to be remembered that such rules of construction are not rules of law and that if their application results in attributing to the testator an intention which appears inconsistent with the scheme of the Will as a whole, then they are not to prevail.

[22] In my view the natural and ordinary meaning of the words in the subject bequest shows the following intention:

1. To transfer ownership of the truck to Ms. Thimot on the condition that she accept liability for any outstanding debt attached to it; and

2. That, by necessary implication, if she refused the bequest, or was unable to assume liability for any outstanding debt, then the truck would remain in the Estate together with the outstanding debt, if any.

[23] The truck was purchased, the loan advanced and the insurance taken out in 2013. The Will was executed in 2015.

[24] It can be inferred that in taking out insurance Mr. Amero intended that the insurance claim would be honored, or if not, that Ms. Thimot would accept the debt in return for the ownership of the truck. In either circumstance the Estate would bear no liability for any debt that might be outstanding against the truck at the time of his death. It seems highly unlikely that he intended that the result would be a windfall of over $30,000 to the Estate, such as the Estate seeks here.

[25] It is the conditional or contingent nature of the bequest that the Estate fails to take into account in its argument. That condition only became available for acceptance by Ms. Thimot after Mr. Amero's death, which also was the event that created the liability of the insurer to pay the Bank the outstanding loan amount. Her decision then was inevitably going to be based upon a determination of what debt she would or could assume if she agreed to accept the bequest of the truck.

[26] It is not surprising that Ms. Thimot elected to accept the truck in this case, given that she received it debt free. But the wording of the bequest did not guarantee to the Estate that the debt would have been paid or that Ms. Thimot would accept the bequest. It was the validity of the insurance contract that ensured that the Estate had no residual liability associated with the truck.

[27] Consider these alternative scenarios: If the insurance claim had been denied and the debt was outstanding, then Ms. Thimot could not be forced to assume the debt, although she might have chosen to do so. It would depend on whether there was equity in the truck and her creditworthiness to assume the debt. After considering these factors she might have renounced her right to the bequest. This highlights the nature of the election that the bequest provided her with, and hence the contingency that the Will created.

[28] I do not read s. 23 of the *Wills Act* to be of assistance in answering this question. It does not offer guidance on the question of a contingent bequest nor does it address the status of outstanding liabilities. What "took effect" at death was a bequest that was subject to communication to Ms. Thimot and her acceptance of the conditions under which she would take. While the bequest was created in Mr.

Amero's lifetime, he could not have compelled Ms. Thimot to assume his debt as a condition of transferring the truck to her. It was his death that catalyzed that election.

[29] I can see no equitable argument in favor of the Estate in this case and none has been argued. The Estate was not a beneficiary of the loan insurance contract and could never have benefited from it directly, except to the extent that it would not be burdened by the debt. The Estate's interest and liability if any could only be determined once Ms. Thimot made her election whether to accept the bequest.

[30] There is another factor to consider when assessing Mr. Amero's intentions. He knew, when he made this bequest, that insurance was in place to pay out the loan and that there should be no outstanding debt at the time that the transfer of the ownership of the vehicle would take place. The addition of the clause conditioning it on assumption of "any outstanding debt" therefore would only be relevant if the insurance did not pay out the loan balance. There is nothing to suggest that it was his intention that the Estate receive an amount from Ms. Thimot, if she accepted the bequest, that would be equal to the amount of the insurance proceeds paid to the Bank of Nova Scotia. His intention was to ensure that the Estate did not have the burden of the debt. In that respect, his objective was achieved.

[31] I conclude that the Estate of Robert Amero is not entitled to claim from Yvette Thimot the amount of $31,903.43, being an amount equivalent to that paid by an insurer to the Bank of Nova Scotia to retire a loan secured by a truck bequeathed to Ms. Thimot on condition.

[32] I will consider written submissions from the parties as to costs if they are unable to agree.

Duncan, J.