PROBATE COURT OF NOVA SCOTIA
Citation: *Thompson v. Oliver Estate*, 2022 NSSC 354

Date: 20221207
Probate Court File: 22099
Docket: Pic No. 516089
Registry: Pictou

Between:

Derek Thompson

Plaintiff

v.

Estate of Phyllis Irene Gray Oliver

Defendant

DECISION ON INTERPRETATION OF WILL

Judge:	The Honourable Justice Frank P. Hoskins
Heard:	September 1, 2022, in Pictou, Nova Scotia
Written Decision:	December 7, 2022
C**ounsel:**	Allison Avery, for the Plaintiff

By the Court:

Introduction

[1] The co-executors of the estate of the late Mrs. Phyllis Irene Gray Oliver, have brought this application under s. 8(1)(c) of the *Probate Act*, SNS 2000, c 31, and s. 64(1) of the *Probate Court Practice, Procedure and forms Regulations*, NS Reg 119/2001, for direction with respect to the proper interpretation of a portion of the deceased's will.

[2] Notice was provided to the other persons interested in the estate and the heirs at law. No notices of objection were filed.

Background

[3] Mrs. Oliver died on March 13, 2021. She had no biological children, and her husband, Howard Alexander Oliver, pre-deceased her.

[4] Mrs. Oliver left behind a will dated June 9, 2009. The will is short and straightforward. It names Derek Thompson, Mrs. Oliver's cousin, and Bruce Oliver, her step-son, as co-executors. Clauses three and four make specific bequests of personal items. Clause five, the residuary clause, states:

> 5. I GIVE DEVISE AND BEQUEATH all the rest, remainder, and residue of my estate to be divided as follows:
>
> ½ of the net proceeds of my estate to my cousin **Derek Thompson** of Cox Health, in the County of Cape Breton, Province of Nova Scotia
>
> - and -
>
> ½ of the net proceeds of my estate to be divided equally between my husband's son **Bruce Oliver** and his wife **Judy Oliver** of New Glasgow in the County of Pictou, Province of Nova Scotia.

[5] The will is silent as to the distribution of the estate in the event that any of the residuary beneficiaries predeceases the testator. Judy Oliver died on September 9, 2015.

[6] Probate was granted to the executors on June 8, 2021. At some point thereafter, the proctor of the estate raised the issue of how clause five should be interpreted, given that Judy Oliver predeceased Mrs. Oliver. The executors then

brought this application, seeking the court's guidance as to the proper distribution of the estate. The application seeks interpretation of only that part of clause five referring to the residuary beneficiaries Bruce and Judy Oliver.

Question

[7] The question for the court is how to properly interpret clause five. Does the fact that Judy Oliver predeceased Mrs. Oliver cause the residuary gift to fall into intestacy? Or does the share bequeathed to Judy Oliver pass to her husband Bruce, the surviving beneficiary of their half of the residue?

General Approach to Will Interpretation

[8] As stated by the authors of the authoritative text, *Feeney's Canadian Law of Wills*, 4th ed, (Toronto: LexisNexis Canada, Inc, Loose-leaf updated to 2022), at §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.

[9] The Nova Scotia Court of Appeal summarized the principles governing the interpretation of wills in *Prevost Estate v Prevost Estate*, 2013 NSCA 20:

> [7] **Much has been written about the principles governing the interpretation of wills.** Often there is a debate about how far the court may stray beyond the language used by the testator in her will. But there is unanimity on the beginning (*Smithers v. Mitchell Estate*, 2004 NSCA 149):
>
> > [19] The first duty of the court is to ascertain the intention of the testator from the language used in the will. Regard must be had, not only to the whole of any clause in question, but to the will as a whole, which forms the context of the clause. Effect must be given, if at all possible, to all parts of the will. A fair and literal meaning should be given to the actual language of the will, the ordinary and grammatical sense of the words to be assigned unless the context otherwise dictates. The context may well include "surrounding circumstances". Only after the language employed by the testator has been approached in this fashion need resort be had to case law and legal rules to see if any modification is required. These principles were referred to with references to relevant authorities by Davison, J. in *Carter Estate Re:* (1991), 109 N.S.R. (2d) 384 (T.D.). The role of "surrounding

> circumstances" in this exercise was discussed by this Court in *Re: Murray Estate* (2001), 191 N.S.R. (2d) 63, at paras 20-25.
>
> [Emphasis mine]
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> …
>
> [9] Sometimes it is necessary for the court to consider "surrounding circumstances" and to make findings of fact or mixed fact and law. When this occurs, the Court of Appeal can only interfere if the trial judge makes a palpable and overriding error. (See for example, *McCormick v. MacDonald*, 2009 NSCA 12 at ¶ 61.)
>
> [10] The Court's interpretative task is to try and ascertain the intention of the testator from the language used – not to import and impose an intention from other cases, dictionary meanings, evidentiary presumptions, maxims of construction or other principles external to the Will and the language of the testator, unless the testator's intention cannot be settled without recourse to those principles. The language of the will itself must be examined contextually. Justice Ritchie expressed it well in *Alberta Giftwares, supra*:
>
> > ...it is an error of law to attribute a fixed meaning to a word of variable connotation by selecting one of alternative dictionary definitions without regard to the context of the paragraph or sentence in which the word is used.

[10] In *Murray Estate (Re)*, 2001 NSCA 25, Chipman, JA described the role of "surrounding circumstances":

> [18] While direct extrinsic evidence of a testator's intention is not generally admissible, evidence of circumstances known to the testator at the time of making the will may be considered by the court. In *Feeney's Canadian Law of Wills* (4th Ed.) the author states at §10.45-10.46:
>
> > §10.45 In the first instance, the court may not be convinced that the testator's intention can be discerned from the will itself. In such a situation, since the testator must be taken to have used the language of the will in view of the surrounding circumstances known to him or her when he or she made his or her will, evidence of such circumstances is necessarily admissible, at least insofar as it corresponds to the facts and circumstances referred to in the will.
> >
> > §10.46 The court puts itself in the position of the testator at the point when he or she made his or her will, and, from that vantage point, reads the will, and construes it, in the light of the surrounding facts and circumstances. This approach is commonly referred to as the "armchair rule".
>
> [19] It is apparent that the words of the residuary clause before us are susceptible of at least two interpretations. There has been debate in the case law whether or not

> an unclear or ambiguous meaning must appear from the language of the will before a court can consider surrounding circumstances. Whatever approach is favoured, there is sufficient uncertainty here to require us to examine the surrounding circumstances, such as the testator's lifestyle, means and assets, and relatives and associations in construing the words of the will.

[11] Although it was not strictly necessary for Chipman, JA to decide between the two approaches, he expressed his preference in *obiter* for what has since become the prevailing procedure:

> [20] Our attention was drawn to the decision of the Court of Appeal of Saskatchewan in *Heidl et al. v. Sacher et al.* (1980), 1 W.W.R. 291. There, a testator devised the residue of an estate to seven named persons and to "the children of Herbert Heidl". On a determination as to the proper construction of the residuary bequest, the question was whether the children took a one-eighth share to be divided between them or whether each of the children shared equally with the other seven beneficiaries. The chambers judge took the former view and the children appealed.
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> [21] The Court of Appeal of Saskatchewan in dismissing the appeal addressed the question of surrounding circumstances. Bayda, J.A., (as he then was) speaking for the court, asked at p. 296 whether the so-called "ordinary meaning" rule of construction should first be applied without admitting and taking into account surrounding circumstances unless it is found that its application produces a meaning which is unclear and ambiguous, or whether the law required the surrounding circumstances to be admitted at the start, and that the "ordinary meaning" rule of construction should be applied in light of them. The former approach was referred to as procedure A and the latter as procedure B.
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> [22] Bayda, J.A. then embarked upon an examination of authorities in England and Canada and concluded at p. 302 that the Canadian authorities tended to put forward procedure B as the proper approach. In his view, it was the approach most likely to elicit the testator's intention and thus more desirable. In the course of his reasons, at p. 300, Bayda, J.A. quoted from the decision of *Re Burke* (1959), 20 D.L.R. (2d) 396 (Ont. C.A.) where Laidlaw, J.A. said, at p. 398:
>
> > ... 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 last will and testament 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 these 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.
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> [23] **In my opinion, this is as good a statement as any as to how we should perform our function. It is not strictly necessary here to determine which procedure is preferable because, as I have said, we are driven to examine surrounding circumstances in any event. Obiter, I would express a preference to the view taken by Bayda, J.A.** See also *Feeney*, *supra*, §10.53-10.57.
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> (Emphasis added)

[12] In *Feeney's Canadian Law of Wills*, 4th ed, (Toronto: LexisNexis Canada, Inc, Loose-leaf updated to 2022), the authors note at §10.54 that "the most recent trend in Canadian cases seems to indicate that evidence of surrounding circumstances should be taken into account in all cases before a court reaches any final determination of the meaning of words." Authorities cited include *Thiemer Estate v Schlappmer*, [2012] BCJ No 843 (SC), where Dari, J. wrote:

> 50 Although the primary source of evidence is the "four corners" of the will, the armchair rule entitles the court to look to extrinsic evidence to identify the surrounding circumstances known to the testator at the time the will was made which might reasonably be expected to influence the testator in the disposition of his or her property. The facts and circumstances that a court may consider include the occupation of the testator, the state of his or her property, and the general relationships of the testator to his or her immediate family and other relatives: *Kaptyn Estate (Re)*, 2010 ONSC 4293 at para. 38. The weight of the authorities demonstrates that the modern judicial approach to interpreting a will is to admit all the evidence regarding the surrounding circumstances at the start of the hearing and then to construe the will in the light of those surrounding circumstances. Ambiguities in the will may only become apparent in the light of the surrounding circumstances: *Rondel* at paras. 23-24.

[13] To determine the testator's intention, the court must read and construe the will in light of the evidence of the surrounding facts and circumstances. Rules of construction will be applied to determine the testator's intention only in the absence of evidence justifying a different inference. The proper application of rules of construction is discussed in *Feeney's Canadian Law of Wills*, 4th ed at §10.21:

> Full effect is to be given to the rules only if the will, when read in the light of the surrounding circumstances and other relevant admissible evidence of the meaning

> which the testator has attached to the words used in the will, does not evince an intention different from that which would be reached by an application of the rule or rules. When the testator's intention is reasonably clear from the will and from other admissible evidence, the courts should disregard the rules of construction.

[14] In their submissions, the executors refer to the rule of construction known as the presumption against intestacy. In *Campbell, Re*, 1963 CarswellOnt 122 (Ont HCJ), Grant, J. articulated the presumption against intestacy as follows:

> 11 Where it is clearly the intention of the testator to dispose of the whole of his property, the Court will follow the construction which gives effect to such intention in preference to a construction which will result in partial intestacy; **this is particularly so where the gift in question is that of residue**: 39 Hals., 3rd ed., pp. 996-7; *Jarman on Wills*, 8th ed., vol. 3, p. 2070; *Williams on Wills*, 1st ed., vol. 1, p. 345; *Re Harrison, Turner v. Hellard* (1885), 30 Ch. D. 390 at pp. 393-5; *Re Hooper*, [1936] Ch. 442 at p. 446; *Eastern Trust Co. v. Leblanc* (1962), 47 M.P.R. 130, 33 D.L.R. (2d) (2d) 609 (N.S.C.A.), particularly at pp. 628 to 630, 47 M.P.R. 130.
>
> (Emphasis added)

[15] The presumption against intestacy was also discussed in *Dunbar Estate, Re*, 1992 CarswellNS 108 (Prob Ct). In that case, the testator's will contained the following provision:

> ALL THE REST, RESIDUE and REMAINDER of my estate, both real and personal, I GIVE, DEVISE and BEQUEATH to my sister-in-law, ISABEL MURRAY, Wife of D.E. Murray and my brother-in-law, HAROLD DUNBAR, both of Stellarton, aforesaid, to be divided between them equally, share and share alike, and to be theirs absolutely.

[16] The brother-in-law predeceased the testator. The testator died leaving no surviving spouse, siblings, parents, or nieces and nephews. She was survived by 10 first cousins and a niece by marriage. The court summarized the questions before it as follows:

> 8 The questions which must be answered by this court are:
>
> 1. Harold Dunbar, having predeceased the Testatrix, does the one-half share of the residue of the estate of Ruth Rebecca Dunbar bequeathed to the said Harold Dunbar:
>
> (a) pass to the estate of Harold Dunbar;
>
> (b) pass to the surviving residuary beneficiary named in the Will of the Testatrix;

(c) lapse and pass as on an intestacy of the Testatrix to that share.

2. If the answer to (c) is yes, to whom does the share of the residue devised to Harold Dunbar by the Testatrix become payable under the provisions of the *Intestate Succession Act*, R.S.N.S., 1989, c. 236.

[17] With respect to the presumption against intestacy, MacDonnell Prob. Ct. J. wrote:

> 19 The court must also bear in mind that there is a strong presumption against intestacy, which has been referred to in many cases. In *The Canadian Law of Wills* (3d Ed), Feeney, vol. 2, p. 24, he states:
>
> > If a will is capable of two constructions, one of which will result in the disposal of the whole estate, the other of which will result in part of the estate remaining undisposed of, the courts will prefer the former. This is so unless it clearly appears that the testator intended part of his estate to go on an intestacy. As was said in one case, a man making a will does not intend "to make it a solemn farce" and therefore he should not be taken to have intended to die intestate. The presumption against intestacy is especially strong when the testator has attempted to insert a general residuary clause, and the courts will especially avoid a construction that would result in a total intestacy.
> >
> > *However, the courts, under the guise of construction, cannot add provisions to a will so as to prevent a partial intestacy.* (emphasis added)
>
> 20 It is to be noted that a clause in a Will must be capable of two constructions before presumption against intestacy becomes relevant.

[18] The court in *Dunbar Estate* held that the presumption against intestacy was not relevant because the will was capable of only one interpretation:

> 21 A careful reading of the residuary clause of the Testator's Estate clearly indicates that her intention was to divide the residue into two equal shares, one of which share was to go to her sister-in-law, Isabel Murray, and the other equal share to go to her brother-in-law, Harold Dunbar, **each of the equal shares to be theirs absolutely**. It is difficult, if not impossible to see how this clause can be capable of any other construction than that which gives each of the named persons a one-half equal share absolutely of the residue of the Testatrix's Estate.
>
> 22 There is no contrary intention expressed in the words of the residuary clause. The clause was drafted by a competent solicitor, and can only be read as expressing a legal intention clearly expressed by the words. **In the first paragraphs of the will the Testatrix had made provisions as to what would happen to her Estate if her husband, Elston Chester Dunbar, should predecease her. If the bequest to the residuary legatees were not to lapse, it would have been normal legal**

> **practice to have provided in the residuary clause what was to happen to the share of the residuary legatee who should predecease the Testatrix. This not having been done, it is not the place of the court to perform this function. Also, it is impossible to place a meaning on the words in the Testatrix's residuary clause which would indicate the intention that the residue was to be shared jointly between the residuary legatees.** Again, it is impossible to find in the ordinary meaning of this clause that the named beneficiaries are not personae designatae but rather a class with a right of survivorship to the remaining member of the class.
>
> (Emphasis added)

[19] Before making a determination of the relevancy of the presumption against intestacy in this case, I must consider whether the testator's intention is reasonably clear when the will is construed in light of the surrounding circumstances.

Evidence of Surrounding Circumstances

[20] In addition to affidavits from each of the executors, the Court has received an affidavit sworn by Roseanne M. Skoke, the lawyer who drafted Mrs. Oliver's will. Mrs. Oliver was Ms. Skoke's neighbour and client. According to Ms. Skoke, Mrs. Oliver had no biological children, and her husband predeceased her.

[21] In Ms. Skoke's affidavit, she states that a review of her file indicates that she drafted a Last Will and Testament for Mrs. Oliver in 2006. Her instructions were that the residuary clause provide for the following: half the net proceeds to Derek Thompson, and half the net proceeds to be divided equally between her husband's son Bruce Oliver and his wife, Judy Oliver. After Mrs. Oliver's husband's death, she instructed Ms. Skoke to prepare a new Last Will and Testament and a Power of Attorney, which were executed by Mrs. Oliver on June 9, 2009. The Power of Attorney appointed Judy Oliver as Mrs. Oliver's Attorney, with Derek Thompson as alternate in the event that Judy predeceased Mrs. Oliver or was unable or unwilling to act.

[22] Mrs. Oliver's instructions for the residuary clause in the 2009 will remained the same as in 2006. As in 2006, the 2009 will did not address what would happen in the event any of the residuary beneficiaries predeceased Mrs. Oliver. Ms. Skoke states in her affidavit:

> 9. I received no further direction as to what would happen in the event of the death of one of the beneficiaries. However, it is my recollection is [*sic*] that Ms. Oliver consider [*sic*] Bruce Oliver and Judy Oliver to be like one and the same.

> 10. I recall Mrs. Oliver was concerned about offending Judy Oliver by not naming her specifically in the will, and therefore my instructions were to name both Bruce Oliver and Judy Oliver and [*sic*] as beneficiaries so that Judy Oliver was not offended by not being named personally.
>
> 11. I received no further instructions to change the Last Will and Testament after 2009.

[23] The affidavit of Bruce Oliver is also relevant to the surrounding circumstances. He states that he is Mrs. Oliver's stepson and that he and his late wife Judy had a "close personal relationship" with her. They regularly spent family time with Mrs. Oliver, attending various social functions and daily activities, including playing bridge and socializing with her friends. They had contact with Mrs. Oliver at least two or three times a week. Bruce Oliver and his wife helped Mrs. Oliver with managing her affairs and any day to day needs that arose.

[24] Finally, Derek Thompson's affidavit identifies Mrs. Oliver's heirs at law, being three cousins. There is no evidence as to the nature of the relationship, if any, that Mrs. Oliver had with these cousins. None of them are named beneficiaries under the will.

Interpreting Mrs. Oliver's Will

[25] In *Mladen Estate v McGuire*, 2007 CarswellOnt 1976 (Sup Ct J), the court also considered how to interpret a will where one of the residuary beneficiaries predeceased the testator. Shirley Mladen's will dictated that the residue of her estate would go to her mother. If her mother predeceased her, the residue was to be divided between Shirley's Aunt Bea and her cousins Bonnie and Roger. The will was silent as to Shirley's intentions if Aunt Bea, Bonnie or Roger predeceased her. In the end, Shirley's mother and Aunt Bea predeceased her. The question before the court was whether Aunt Bea's half of the residue would fall into intestacy and be distributed to Shirley's legal heirs, or go to the remaining surviving residuary beneficiaries. Justice Belobaba wrote:

> 23 If I consider only the wording in Shirley's Will, several things become immediately apparent. It is clear that Shirley intended to dispose of her entire estate. It is clear that she believed that both her mother and Aunt Bea would survive her — otherwise why name them as residuary beneficiaries? It is also clear that she had a special connection to and fondness for her Aunt Bea, and her first cousins, Bonnie and Roger. To each of them, she gave a significant monetary gift and, if her mother predeceased her, she left to the three of them the residue of her Estate — Aunt Bea getting one-half, and Bonnie and Roger each getting one-quarter.

> 24 Bonnie and Roger were obviously very important to Shirley. However, I am unable to conclude from the wording in the Will alone, that it was Shirley's intention that Aunt Bea's portion would automatically go to Bonnie and Roger, if Aunt Bea were to predecease her. I note that Shirley also bequeathed significant sums of money to several other people — for example, $45,000 to her stepson George Mladen, and $20,000 to each of her godsons, Christopher and David Elia.
>
> 25 In short, there is nothing in the language of the Will itself that would allow me to conclude that if Shirley was predeceased by her Aunt Bea, that she would have intended that Aunt Bea's portion should go only to Bonnie and Roger.
>
> 26 I can, however, come to this conclusion if I am able to sit in the testator's armchair and consider evidence of the surrounding circumstances. Based on the uncontradicted evidence in Bonnie's affidavit, I am able to acknowledge the fact that Shirley considered Bonnie and Roger as her only first cousins, and together with Aunt Bea, they were the extent of her remaining family. I also am able to consider the fact that Shirley didn't know the other three cousins. To her, the other three cousins were virtual strangers.
>
> 27 In sum, if I sat in Shirley' armchair and considered the surrounding circumstances as described in the affidavit evidence, I would have no difficulty finding in favour of Bonnie and Roger, the surviving residuary beneficiaries. If Aunt Bea were to predecease Shirley, would Shirley have intended any part of Aunt Bea's portion to go to three family members that she did not know and were, to her, virtual strangers, or would she have intended that it go to Bonnie and Roger, her "only cousins" and after Aunt Bea died her "only family"? The answer is self-evident.

[26] As in *Mladen Estate*, it can be reasonably inferred from the wording of Mrs. Oliver's will that she intended to dispose of her entire estate. At the time she executed the will, she expected that Derek Thompson and Bruce and Judy Oliver would outlive her. Unlike in *Dunbar Estate*, Mrs. Oliver's will did not address what should happen if any legatees other than the residuary beneficiaries should predecease her. In other words, it cannot be reasonably inferred that Mrs. Oliver made the conscious decision to omit such direction with respect to the residuary beneficiaries, with the intention being that their gifts would fall to intestacy if they predeceased her.

[27] It also can be reasonably inferred from Mrs. Oliver's will that the residuary beneficiaries were very important to her. Other than a diamond ring and her Royal Dalton figurines, which she left to two other individuals, Mrs. Oliver bequeathed her entire estate to the residuary beneficiaries – half to Derek Thompson, and the other half divided equally between Bruce and Judy Oliver.

[28] The importance of the residuary beneficiaries to Mrs. Oliver is buttress by the evidence of the surrounding circumstances. On the same date that Mrs. Oliver executed the 2009 will, she executed a Power of Attorney appointing her "Daughter-in-Law Judy Oliver" as her Attorney. Mrs. Oliver clearly trusted Judy to make critical financial and medical decisions on her behalf and in her best interests.

[29] As stated in Bruce Oliver's affidavit, he and his late wife Judy had a close relationship with Mrs. Oliver, and regularly spent time with her. They socialized together often, and Bruce and Judy helped Mrs. Oliver manage her affairs. Also, as stated in the executors submission, "Mrs. Oliver's closet family was Bruce Oliver and his wife Judy. That they were people she turned to for assistance with her daily needs, for companionship."

[30] Ms. Skoke stated in her affidavit that it is her recollection that Mrs. Oliver considered Bruce and Judy Oliver "to be like one and the same." They were, after all, husband and wife. Moreover, the decision to name both Bruce and Judy in the will arose out of Mrs. Oliver's concern that Judy might be offended by not being named personally.

[31] Upon an examination of the structure of the residuary clause in issue, and a consideration of the position of the beneficiaries in the testator's life, it is reasonably clear that Mrs. Oliver's wanted Judy Oliver's share of the residue to go to Bruce Oliver.

[32] Thus, I find that when Mrs. Oliver's will is construed in light of the surrounding circumstances, it is evident that she would have wanted Judy Oliver's share of the residue to go to Bruce Oliver, Mrs. Oliver's stepson and Judy's husband, rather than for it to fall into intestacy.

[33] If I am wrong and the will is capable of two different constructions, one which results in the disposal of the whole estate and another which results in part of the estate remaining undisposed of, the presumption against intestacy applies, and the result is the same.

Conclusion

[34] I direct that Judy Oliver's gift under clause five of Mrs. Oliver's will go to Bruce Oliver.

[35] I would ask counsel for the executors to prepare the order.

Hoskins, J.