SUPREME COURT OF NOVA SCOTIA
Citation: *Graves v. Graves Estate*, 2022 NSSC 231

Date: 20220607
Docket: *Annapolis Royal* No. 515179
Registry: Annapolis

Between:

Jon Lorne Graves

Applicant

v.

Estate of Walter Freeman Graves

Defendant

Judge:	The Honourable Justice Pierre L. Muise
Heard:	June 7, 2022 in Annapolis Royal, Nova Scotia (Oral decision rendered June 7, 2022)
Counsel	Rebecca Hiltz-LeBlanc, KC, for the Applicant No persons present for the Defendant Nick Moore, for Sandra May Graves, supporting the Application, but not appearing.

Application to Extend Time for Spouse to Elect under S. 17(b) of *Wills Act*

[1] NOTE: This written version of the oral decision rendered in this matter has been edited for grammar, structure, complete citations, organization, and ease of reading without changing the reasoning or the result.

[2] Walter Freeman Graves executed his last will and testament on March 17, 2017, without stating it was in contemplation of marriage. He subsequently married Sandra May Graves on February 14, 2018. He passed away on May 14, 2020. Pursuant to s. 17 of the *Wills Act* of Nova Scotia, his will is considered revoked unless his widow elects, in a writing, signed by her, to take under the Will, and registers that writing in the Probate Court within one year of the testator's death.

[3] In the case at hand, that did not occur. None of the beneficiaries under the Will were aware it was required, until after Probate was granted and Ms. Graves' lawyer informed the Probate Court of the issue. The Grant, which had been issued June 16, 2020, was revoked September 15, 2020, at the request of Ms. Graves.

[4] Following subsequent discussion regarding the administration of the Estate, Ms. Graves decided she wanted to take under the Will, as opposed to intestacy. She signed a document confirming her election pursuant to s. 17(b) to take under the Will. However, it is dated October 26, 2021, well past the one-year limitation period.

[5] The personal representative named in the Will, Jon Lorne Graves, brought this application to extend the time for making and filing the election so that it will prevent the statutory revocation of the Will.

[6] He is the deceased's son.

[7] The only other child of the deceased is Marie Louise Sherman.

[8] They and Ms. Graves are the only beneficiaries under the Will, and there is no one else who stands to inherit on intestacy.

[9] Ms. Sherman supports her brother's application to extend the time for making and filing the election, and his request for a grant of probate in relation to the Will.

[10] So, all interested persons support the granting of this application.

[11] As submitted by the Applicant:

- There is no provision in the *Wills Act*, *Probate Act*, or the *Probate Regulations* for such an extension of time.
- Therefore, sections 100 and 102 of the *Probate Act* of Nova Scotia, in combination, render the Nova Scotia *Civil Procedure Rules* applicable.

[12] *Rule* 2.03 (1)(c) gives this Court discretion to lengthen a period provided in a Rule. When *Rule* 2.03(1)(c) is reasonably adapted to fit the context of filing an

election in the Probate Court, as we have here, it applies to the time for executing and filing an election under s. 17(b) of the *Wills Act*, as suggested by the Applicant.

[13] The Applicant submitted that, in determining whether to grant the extension requested, the Court should use the test for extending time to appeal, with appropriate adjustments. He provides, as one example of a case outlining the test, **R. v. R.E.M.**, 2011 NSCA 8.

[14] However, he submitted that the Court should focus only on what prejudice was caused by the delay and ultimately the interests of justice. He correctly noted that the merits are not an applicable consideration. However, he did not explicitly deal with the questions of intention to file within the deadline and reasonable excuse for the delay.

[15] That may because of the awkwardness of adapting the test for extension of time to appeal to a request to extend the time for a s. 17(b) election.

[16] To my knowledge, the only other Canadian province with legislation which provides for a widow to elect to take under a will, as opposed to otherwise, is Ontario. The provision in the Ontario *Succession Law Reform Act* which previously provided for automatic revocation of a will on subsequent marriage was repealed in

2021. The election, which is provided for in the Ontario *Family Law Act*, is an election to take under the will as opposed to an equalization of net family property.

[17] The test to extend time, outlined in s. 2(8) of the Ontario *Family Law Act*, was applied in **Ucci v. Ucci Estate**, 2002 CarswellOnt 323. In that case, the issue was whether the motion to extend could be made *ex parte*. S. 6(11) of that *Family Law Act* provides that, if no election is made, the widow is deemed to have elected to take under the will. Therefore, though the decision does not specify, presumably Ms. Ucci wanted to elect to take her entitlement under the *Family Law Act*, which would be more likely to be prejudicial to interested parties. The Court logically concluded that the only way to determine that prejudice was to require notice.

[18] In Nova Scotia, there is no deemed election to take under the will. The widow must expressly elect in writing to take under the will. If she does not, the will is automatically revoked, and her inheritance will be governed by the Nova Scotia *Intestate Succession Act*. That distinguishes the situation here in Nova Scotia from that in Ontario.

[19] However, in both Provinces, the election still impacts the administration and distribution of the estate, and thereby affects persons interested in the estate. In Nova Scotia, it not only impacts those who stand to inherit under the will. It also impacts

those who stand to inherit on intestacy. Those additional interested persons must have notice of any application to extend. However, the test for extension of time in the Ontario *Family Law Act* is equally appropriate and applicable in Nova Scotia.

[20] It is more appropriate and applicable than the test for extension of time to file an appeal. Therefore, I will adopt it and apply it. It provides that:

> The court may, on motion, extend a time prescribed by this Act if it is satisfied that,
>
> (a) there are apparent grounds for relief;
>
> (b) relief is unavailable because of delay that has been incurred in good faith; and
>
> (c) no person will suffer substantial prejudice by reason of the delay.

Are there Apparent Grounds for Relief?

[21] If properly executed and filed in time, the election under s. 17(b) of the *Wills Act* takes effect without any hearing involving the balancing of competing interests. The widow, by making the election, gets the relief she is seeking. Thus, if an extension is granted, Ms. Graves will obtain the relief she has chosen.

Is Relief Unavailable Because of the Delay?

[22] The only reason Ms. Graves cannot automatically make her election is because of the delay.

Has the Delay been Incurred in Good Faith?

[23] The first part of the delay was from the date of death, May 14, 2020, to when Ms. Graves was made aware of the principle of will revocation by marriage, which was on or before September 15, 2020, and prior to when she learned of the ability to elect to prevent that invalidity. That part of the delay was obviously in good faith, as Ms. Graves and the deceased's children were unaware of the presumptive invalidation of the Will. Otherwise, they would not have sought probate.

[24] At that point, the deadline for election had not yet expired. There were still about 8 months to execute and file the election.

[25] In the materials filed, the only information provided to explain the delay after that is that there was discussion within the family regarding the administration of the Estate and its limited assets, following which Ms. Graves decided she wanted to take under the Will rather than in intestacy, and executed the election on October 26, 2021.

[26] That information at least indicated that there was a legitimate reason for Ms. Graves' delay. She did not simply ignore the matter or intentionally cause delay. She initially, as part of her request to revoke the grant of probate, said she was seeking a declaration that the Will was revoked by her marriage to the deceased. More likely than not, that was to preserve the Estate and her right to make a choice of what she

would inherit. She discussed the matter with the family. She had a lawyer at the time. Therefore, presumably she discussed her rights and options with that lawyer.

[27] In the course of the hearing, I received the following information which sheds further light on the reasons for the delay.

[28] Initially, both the parties and their lawyers were unaware of the ability to sign an election to overcome the presumptive invalidation. It was one of the lawyers, Mr. Moore, who discovered it could be done. There had been some discussion regarding trying to do it. There was also some delay that resulted from the pandemic lockdown post-revocation. As soon as the ability to elect was discovered, she decided to sign the election.

[29] This additional information clearly shows the delay was incurred in good faith.

Will No Person Suffer Substantial Prejudice Because of the Delay?

[30] The delay has already caused prejudice to the Estate and to its beneficiaries, as its administration has been on hold since the Grant of Probate was revoked on September 15, 2020.

[31] However, both of the deceased's children, one of which is the personal representative of the Estate, support the request to extend.

[32] It appears they stand to inherit less if the time to elect is not extended. The Will only gives Ms. Graves a life estate in the home and farm property, plus the right to use all the furniture, farm machinery, and farm equipment there. She is already 85 years of age. Since she has already attained the average life expectancy, it greatly limits the value of her life estate. Under the *Intestate Succession Act*, she would be entitled to the home, if worth more than $50,000, or to the home as part of the $50,000 if worth less.

[33] There are no additional persons who stand to inherit on intestacy. Thus, no possible prejudice to such persons.

[34] Consequently, the children of the deceased would suffer substantial prejudice if the time to file is not extended. In comparison, the prejudice resulting from the delay is not substantial.

[35] Similarly, the delay did not substantially prejudice Ms. Graves as it gave her time to discuss the estate matters, learn more about her rights and options, and reflect on her choice of inheritance mechanisms. She now wants to implement that choice. Even though she appears to be giving up some inheritance value, she may be gaining

other benefits that she considers to be of greater value to her. However, I do not have, and do not need, that information. Either way, her lawyer has consented to the application on her behalf.

[36] As noted by the Applicant, "everyone wants the Will to stand".

[37] Though these points are sufficient to satisfy the test for extension, I will comment briefly on the Applicant's "interests of justice" argument.

[38] I agree that it is in the interests of justice to advance the administration of the Estate. However, that could occur regardless of whether it is dealt with under the Will or intestacy.

[39] I agree that the purpose of most testamentary legislation is to ensure a testator's final wishes are carried out. However, a purpose of s. 17(b) of the *Wills Act* is to help ensure a surviving spouse is provided for, irrespective of the deceased's testamentary intentions. In that way it is comparable to the Nova Scotia *Testators' Family Maintenance Act*. Judicial consideration of that Act has upheld the legislative intention to limit a testator's ability to choose how to distribute their estate in certain circumstances.

[40] Nevertheless, in the case at hand, all interested persons want to give effect to the deceased's testamentary intentions.

[41] For this reason, and the reasons outlined, it is fit and proper to extend the time for executing and filing the s. 17(b) election of Sandra May Graves.

[42] Consequently, I order that the time be and is extended and that the election executed by her, dated October 26, 2021, satisfies the requirements of s. 17(b) of the Nova Scotia *Wills Act*.

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Pierre Muise, J.