SUPREME COURT OF NOVA SCOTIA
Citation: ***Estate of Victor Sweeney***, 2023 NSSC 339

Date: 20230510
Docket: 459975
Registry: Yarmouth

Between:

Estate of Victor Leslie Sweeney

Applicant

v.

Jack Sweeney

Objecting Party

Judge:	The Honourable Justice Pierre Muise
Heard:	May 10, 2023, in Yarmouth, Nova Scotia
Counsel:	Matthew Fraser, for the Estate Jack Sweeney, self-represented

By the Court:

Decision On Application For Proof In Solemn Form Of Document Sought To Be Admitted To Probate As A S. 8A Will (Rendered Orally May 10, 2023)

INTRODUCTION

[1] Victor Sweeney passed away in August of 2016, predeceased by his wife. He had no children. He left a properly executed type-written will dated July 7, 1999 with substantial parts crossed out and handprinted amendments made in pen. The changes, among other things, substituted his brother, Malcolm Sweeney, as executor. Malcolm Sweeney brings this application for an order declaring the Will, with the hand-applied changes, a valid s. 8A Will.

[2] I am rendering this decision orally. Should it be reduced to writing, I reserve the right to edit it for organization, readability, complete citations, grammar and punctuation, without changing the reasoning or the result.

[3] The Application was initially contested by Charmaine Stevens, niece of the deceased and named beneficiary under the 1999 Will. That objection has been

withdrawn. It is still contested by Jack Sweeney, brother of the deceased, who is self-represented.

[4] There is no challenge to the deceased's capacity to make a will.

[5] Capacity is presumed and there is no evidence suggesting Victor Sweeney did not have the requisite capacity.

[6] In closing argument, Jack Sweeney submitted that Victor Sweeney must have been conned into making the handprinted changes to his will. He agreed that he did not present any evidence to support that argument.

[7] When asked what evidence there would be of that, he related the following views held by him. Barbara Brittain has a history of doing it in relation to other estates, starting with that of their aunt, Marge. Malcolm Sweeney started off as a criminal in his teenage years. He would say that Malcolm Sweeney also got a tidy sum from his wife's grandmother. Even if these views of his are true, they would not present any evidence that either of them put any pressure on Victor Sweeney or exercised undue influence upon him. His argument is mere speculation based on his view of their past action relating to other people.

[8] There is no non-speculative indication of pressure or undue influence having been exerted upon Victor Sweeney.

ISSUES

[9] The issue to be determined is whether the document in question is a valid statement of the deceased's testamentary intent in accordance with s. 8A of the ***Wills Act***?

LAW AND ANALYSIS

[10] S. 8A of the **Wills Act**, R.S.N.S. 1989, c. 505, states:

> 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.

[11] In ***Sweeney Cunningham Estate v. Sweeney***, 2013 NSSC 299, at paragraph 24, the court succinctly stated:

> The test to be applied on the hearing of a s.8A application is now well established in this court. It was recently applied in **Robitaille v. Robitaille Estate, 2011 NSSC 203** and in **Komonen v. Fong, 2011 NSSC 315**, having been adopted from the leading case of **George v. Daily (1997) 115 Man.R. (2d) 27**. In the latter case, the Manitoba Court of Appeal considered a similarly worded provision in that province's *Wills Act*. It ruled that the essential quality of the legislative term "testamentary intention" is that there must be a deliberate or fixed and final expression of intention as to the disposal of assets upon death. The Court of Appeal added (at para. 66)

> Whether it is the deceased's own instrument or the notes or writing made by a third-party, the crucial question to be answered is whether the document expresses the animus testandi of the deceased -- a deliberate or fixed and final expression of intention as to the disposal of his/her property on death.

[12] The Court in ***Komonen v. Fong***, 2011 NSSC 315, at paragraphs 21 and 22, quoted paragraphs 61 and 64 of the Manitoba Court of appeal decision in *George v Daily* (1997), 115 Man. R. (2d) 27, which state:

> **[61]** Not every expression made by a person, whether made orally or in writing, respecting the disposition of his/her property on death embodies his/her testamentary intentions. The law reports are filled with cases in which probate of holographic instruments has been refused because they did not show a present intention to dispose of property on death. **Gray Estate, Re,** [1958] S.C.R. 392, was such a case.
>
> ….
>
> [64] 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: Re Gray; Molinari v. Winfrey, [1961] S.C.R. 91; and Canada Permanent Trust Co. v. Bowman, [1962] S.C.R. 711."

[13] Also, as highlighted in ***Komonen v. Fong***, at paragraph 24, the Manitoba Court of Appeal, added:

> While s. 23 is a remedial piece of legislation, empowering the court to give effect to testamentary intention contained in a document not otherwise conforming to the **Act**, the section imposes a significant onus on an applicant. I describe the onus as significant because in disposing of an application under s. 23, the court must be ever mindful that the question for determination is testamentary intention and the person who can best speak to that intention, the deceased, is not present to give evidence. The onus will only be satisfied by the presentation of substantial,

> complete and clear evidence relating the deceased's testamentary intentions to the document in question.

[14] In the case at hand, it is Malcolm Sweeney who bears this significant onus.

[15] As noted, at paragraph 33 of ***Kokomen***, the question is whether the required testamentary intention existed at the time the document was completed, recognizing that a valid will may subsequently be revoked or changed.

[16] The Court in ***Peters Estate (Re)***, 2015 NSSC 292, at paragraph 19, provided the following non-exclusive list of questions to consider in determining whether the requisite testamentary intention has been established:

- What is the degree of the formality of the language in the document?
- Is it dated?
- Is it signed?
- Has it been sealed?
- Was it delivered to a person, a specific person, with or without instructions as to what to do with it?
- Were there are any statements made by the testatrix, either at the time of delivery, or in the document itself that speak to the anticipation of death; that the document was intended to reflect a disposition after death?
- Is there any indicia of when it was expected that the document would read?
- The certainty of the bequests set out in the document.
- Whether there are reasons offered for gifting as set out in the document.
- Whether there is a reference to an existing Will that might tie it back to a Will.
- How permanent was the document intended to be - was it written in ink, or in pencil? i.e., Was this just a penciled thought for erasing later or not?

- Whether the document was on a form or is it entirely, as in these notes, in the handwriting of the testatrix.

[17] I will now discuss the relevant factors in the case at hand.

[18] It is clear that the typewritten 1999 will upon which the changes were made was prepared by a lawyer. It is in formal legalistic language. The changed version keeps the formal legalistic language and only changes the executor, beneficiaries and the number of shares of the residue to be divided. It even adjusts the pronouns to match the change in gender of the newly named executor.

[19] It adds a clause regarding not wanting to be kept on life support. That is a medical directive clause and does not impact the administration of the Estate. However, the fact that it was numbered in sequence shows a continued level of formality.

[20] The document is not dated. The date is crossed out and the word "PRESENT" is substituted. The document does not have any additional signature or initials attesting to the changes. These points would generally militate against a finding of fixed and final intention. However, I will make further comments on these points later.

[21] The document was not delivered to anyone and no one was given instructions in relation to it. However, the hand-applied changes were on his proper will making it clear that he was expressing testamentary intentions and that it was meant to be read upon his death, at least if not yet retyped into a fully type-written and executed will. Also, it was relatively easily found amongst other documents by Scott and Malcolm Sweeney as they were cleaning up following Victor's death.

[22] Victor Sweeney made statements to Malcolm Sweeney, Barbara Brittain (his sister), Ernest and Constance Deviller (friends of his), and Scott Sweeney (his nephew and son of Malcolm Sweeney) regarding his testamentary intentions. He told them all that he was going to leave everything to Malcolm and Barabara. He also told Scott that he did not want his other brother, Jack Sweeney, to have anything.

[23] I must determine whether I can consider these statements attributed to the deceased in light of s. 45 of the **Evidence Act** of Nova Scotia.

[24] That provision was discussed in ***Harvey Estate (Re)***, 2006 NSSC 118, where the Court, at paragraphs 11 to 15, stated:

> **B.1 Corroboration**

11 In any proceeding "with respect to any dealing, transaction or agreement with the deceased or with respect to any act, statement, acknowledgement or admission of the deceased," the claimant's evidence must be corroborated "by other material evidence." So says s. 45 of the **Nova Scotia Evidence Act**.

12 Laskin, J.A., stated the purpose succinctly in **Burns Estate v. Mellon** (2000), 133 O.A.C. 83 (Ont. C.A.) in paragraph 5:

> Section 13 [our s. 45] addresses the obvious disadvantage faced by the dead: they cannot tell their side of the story or respond to the living's version of events.

B.2 Burden of Proof

13 Laskin, J.A., rejected the view that the living person's evidence, even if corroborated, should be looked upon with suspicion and the evidence not acted upon unless he/she "removes all doubt from the judicial mind"; this was the generally accepted view set out in the seminal Ontario Court of Appeal decisions in **Bayley v. Trusts & Guarantee Co.**, [1931] 1 D.L.R. 500 (Ont. C.A.), **Johnstone v. Johnstone** (1913), 28 O.L.R. 334, which were relied upon as the law in **Widdifield on Executors and Trustees**, 6th Edition (Carswell: Looseleaf, to Release 3 - 2003) at pages 3-16.

14 Laskin, J.A., concluded that the case law supported the application of the civil burden of proof where a party must meet the corroboration requirement "or seeks to rebut a presumption of resulting trust." (paragraph 16).

B.3 "Other Material Evidence"

15 In **Re O'Connell**, [1980] N.S.J. No. 128, 1980 CarswellNS 243 (NS Probate Ct), upheld on appeal [1981] N.S.J. No. 48, [1981 CarswellNS 90 (NSCA)], McLellan, J., reviewed the law in the context of claims against an estate by a common law wife for quantum meruit and unjust enrichment.-He adopted the words of Killam, J., in **Thompson v. Coulter**, (1903), 34 S.C.R. 261 at paragraph 5:

> ... A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case.

and Tashereau, C.J.C., in **McDonald v. McDonald**, (1903), 33 S.C.R. 145 at paragraph 8:

> Circumstantial evidence and fair inferences of fact arising from other facts proved, that render it improbable that the fact sworn to be not true and reasonably tend to given certainty to the contention which it supports and are

> consistent with the truth of the fact deposed to, are, in law, corroborative evidence.

[25] The Court in ***Harvey Estate*** found that there was corroboration provided by the Estate witnesses' evidence of the deceased's characteristics, relationship with his family, and circumstances surrounding the creation of a joint account with his sister.

[26] In the case at hand, the Devillers are independent witnesses who provide direct corroborative evidence. Though they are both now deceased, their affidavit evidence was allowed into evidence under the principled exception to hearsay.

[27] In addition, the document itself provides clear and direct corroborative evidence. It leaves everything to Malcolm and Barbara, leaving out Jack, the only other person who stands to inherit on intestacy. Further, this result is consistent with Scott's evidence that Victor, Malcolm and Barbara never got along with Jack and Malcolm and Barbara were constant and present in Victor's life until his death.

[28] Therefore, these statements are admissible and support a finding that the document expresses Victor's fixed and final testamentary intention.

[29] The bequests in the document are clear and certain.

[30] The document itself does not give reasons for making the gifts expressed in it. However, for reasons already noted, Victor's choice of beneficiaries makes sense, in terms of leaving his Estate to all his next of kin except the one he did not get along with.

[31] Further, his prior primary executrix had been his wife, who had predeceased him. It made sense to change that. His secondary executor and all his beneficiaries had been people or entities in British Columbia, his former residence. After the passing of his wife in 2011, he had moved back to his home area in Yarmouth County, where his siblings lived. It made sense to change the executor to someone living in Yarmouth County, where his assets were, and to make the people he was spending the most time with his beneficiaries, especially considering they were his next of kin.

[32] Paragraph 7 of Jack Sweeney's affidavit filed April 27, 2023, states:

> "The only estranged among the siblings was Malcolm, a criminal (vehicle theft, land theft and assault) and Barbara whom was too lazy to work, but they both thrive on getting dead peoples money."

[33] That appears to be in response to the last sentence at page 5 of the Applicant's brief which refers to a conversation Victor Sweeney had with Scott Sweeney, 3 to 4 months before his death, at the Dinner Plate Restaurant. The sentence states:

> "During this conversation Victor mentioned nothing would go to Jack, his estranged brother."

[34] However, Scott Sweeney does not say, in his affidavit, that Jack Seeney was the estranged brother. He said that Victor, Malcolm and Barbara did not ever get along with Jack who was their brother. The adjective "estranged" was used by the author of the brief as their characterization of the relationship.

[35] Jack Sweeney did not challenge Scott Sweeney's evidence that he did not get along with those three siblings. His denigrating comments towards Malcolm Sweeney and Barbara Brittain are consistent with Scott Sweeney's evidence regarding them not getting along.

[36] Jack Sweeney, while cross-examining Scott Sweeney, did challenge his affidavit evidence stating:

> "I recall as a young boy visiting with my Uncle Victor many times. I was very close to with my father. They enjoyed hunting and fishing and would tell hunting and fishing stories quite often when I was in their presence."

[37] He challenged it by having Scott Sweeney agree that Victor Sweeney lived away, including in Greenwood and in PEI. However, Scott Sweeney explained that they visited back and forth many times. Victor would come down here or they would go to Greenwood. During those times, Victor would talk about fishing and

hunting. That was a reasonable, credible and trustworthy explanation. Scott Sweeney's evidence on that point was unshaken.

[38] The handprinted parts being on a typed will itself tied the combined document to that initial will.

[39] The crossing out and handprinted changes are in pen, denoting a sense of permanency.

[40] The changes being inserted in a pre-existing valid will had the effect of using that will as a form.

[41] I find that the hand-inserted portions were, more likely than not, inserted by Victor Sweeney himself.

[42] That point was not contested by Jack Sweeney.

[43] Scott Sweeney identified them with certainty as being Victor's.

[44] The expert report of Graphoanalyst Kenneth John Davies expresses a 70 to 80% level of probability that the hand-printing was done by Victor Sweeney. He came to that conclusion after comparing the document with known samples of Victor's hand printing.

[45] The parties consented to that report being admitted into evidence.

[46] Authentication of the handwriting as being Victor's is clearly logically relevant.

[47] Though judges may do their own hand-writing comparisons, they do not have the level of methodological knowledge and experience that a graphoanalyst brings. The assistance of a graphoanalyst helps guard against potential pitfalls associated with lay hand-writing comparisons. The methodological explanations and analyses conducted by the graphoanalyst are beyond the knowledge of an ordinary trier of fact. Therefore, the evidence meets the necessity requirement.

[48] Mr. Davies has significant knowledge and experience in document authentication, has no connection to any party, and promises to give an independent and impartial opinion. He is clearly a properly qualified graphoanalyst capable of giving opinion evidence regarding document comparison and authentication, including the probability of two or more handprinted or handwritten documents having been made by the same individual.

[49] The evidence is legally relevant as no one saw Victor print the changes and he did not tell anyone to do it for him. So, authentication is an important point. The expertise of a graphoanalyst imports an independent, unbiased, methodical and

detailed comparison which is far more reliable than the lay opinion of the son of one of the only two beneficiaries named in the changed will. The time required to lead the evidence would have been relatively minimal. The methodology is clear and easy to follow. There is little danger of usurping the role of the trier of fact or the trier of fact abdicating their role to the expert. Therefore, the benefits of admitting the evidence clearly outweigh the potential risks.

[50] I find the expert opinion evidence of Mr. Davies is admissible.

[51] It, along with Scott Sweeney's evidence, establishes that the handprinted changes in question were, more likely than not, made by Victor Sweeney. It would not make sense that someone else would have done the crossing out. Therefore, I find all the changes were made by Victor.

[52] As I already discussed in part, Victor Sweeney crossed out the date of the will and hand-printed in its place the word "PRESENT" and did not add a new signature. Given the formal and careful way he changed the will by handprinting, while leaving the parts of the will he wanted to keep, it would not be unreasonable to infer he would have left the original signature as a valid signature. However, inserting "PRESENT", instead of an actual date, suggests he intended to bring that document to a lawyer as precise instructions for what he wanted his new will to

say, including indicating to the lawyer that the date of the execution was to be inserted where he put the word “PRESENT”, and, by extrapolation, suggests that he did not intend that the altered document in question would remain in that form as his final will. Otherwise, one would have expected him to at least insert the date he was making the changes, rather than stating “PRESENT”, and perhaps also to have signed it. Their absence is a factor which can arguably militate against a finding of a fixed and final testamentary intention because his intention could potentially change after discussions with his lawyer.

[53] However, as already highlighted, it is the intention at the time of the making of the document that is relevant. Further, in ***MacKinnon v. MacKinnon (Estate of)***, 2021 NSSC 272, the Court declared to be valid, handwritten notes of the deceased that were not signed or dated and found to be notes prepared for an estate-planning meeting with her lawyer scheduled for later on the day that she passed. Those notes were point-form. In the case at hand, the type-written part remaining after the crossed-out portions are struck, combined with the handprinted additions, creates a complete and professionally worded will. Thus, the document in the case at hand is a much clearer expression of testamentary intention than the document in the ***MacKinnon*** case.

[54] Malcolm Sweeney effectively acknowledged on cross-examination that he did not speak to Victor Sweeney in the moments immediately preceding his death. Therefore, Victor Sweeney could not have informed him that his testamentary intentions, at that time, remained that which he had handprinted on the will and informed Malcolm Sweeney and others of. However, this same principle, that it is the intention at the time of the making of the document that is relevant, makes the lack of confirmation immediately before death irrelevant.

[55] Clause 2 does contain the handprinted words “MY SISTER” which are crossed out, followed by the handprinted word “BROTHER”, in turn followed by “MALCOLM BRUCE SWEENEY, OF TUSKET, NOVA SCOTIA”. That is indicative of either a change of decision as to who Victor Sweeney wanted the personal representative to be, or an error initially. The fact that he did not complete the choice by naming his sister suggests the latter and does not detract from a finding of fixed and final intention in any significant way.

[56] Jack Sweeney has presented evidence alleging that Malcolm Sweeney and Barabara Brittain are biased against him, and that Malcolm Sweeney is not fit to be the personal representative of the Estate. He also raised points on cross-examination of Malcolm Sweeney which might call into question whether, in his present condition, he is a still fit to be the personal representative.

[57] I have considered their interest in the outcome of this application and their obvious animosity towards Jack Sweeney in assessing their evidence.

[58] Whether Malcolm Sweeney is a fit personal representative is not an issue to be determined in this application. This application is only to determine whether the document in question is a valid will. If it is, then Malcolm Sweeney can then apply for probate using it. If probate is granted, then, any person meeting the definition of "interested person" for probate proceedings can apply to have him removed as personal representative.

[59] Jack Sweeney also alleges that an agreement had been reached amongst himself, Malcolm Sweeney and Barbara Brittain, which was not put into effect. There has been no application to enforce the terms of any such agreement. Even if there was, at some point, consent amongst the parties regarding the interpretation of the document in question, I am not bound by it.

[60] Jack Sweeney advances that he has heard that the lawyer for Malcolm Sweeney has agreed to take a share of the value of the Estate in lieu of a fee. He appears to be referring to a contingency fee agreement. That method of payment is permissible, subject to Court oversight regarding the appropriateness of the percentage agreed upon. It is consistent with Malcolm Sweeney's evidence that he

was concerned about his ability to make payments needed to maintain the Estate pending grant of probate. It does not impact the determination of this application.

[61] Jack Sweeney expressed concern that Matthew Fraser, lawyer for Malcolm Sweeney, had written a letter to the Court. The letter he was referring to was a brief which Mr. Fraser was obligated to file to comply with the rules of Court.

[62] Jack Sweeney deposed, at paragraph 7 of his affidavit, that:

> "Malcolm Sweeney stated in 2017 that he did not know how to pay for Victor's death, so he did not believe in Victor's Will, Page 5, #8 states 'cremated, it is prepaid'."

[63] Malcolm Sweeney confirmed that is what the will said and ultimately that he believed, though he did not recall for sure, that it had been prepaid.

[64] Malcom Sweeney's exact and complete 2017 statement was not put before the Court in this Application. Malcom Sweeney's evidence was that he had complied with Victor Sweeney's expressed wishes that his ashes be spread on the deer trail where he hunted. However, he did not state that there were no funeral or remembrance type expenses. Also, the mere fact that cremation had been prepaid would not eliminate other potential estate expenses.

[65] Further, even if Malcolm Sweeney did not believe Victor Sweeney's statement that the cremation had been prepaid, it would not be sufficient to rebut the presumption that Victor Sweeney had testamentary capacity. Therefore, this point does not detract from a finding that the document is a valid will.

CONCLUSION

[66] Considering these points, I find that the document in question does represent Victor Sweeney's fixed and final expression of intention as to the disposal of his assets upon death, even though he did not make it to a lawyer's office to have another will reflecting those intentions prepared and executed.

[67] It clearly does not show an intention to revoke the prior will without the noted changes in executor and beneficiaries. It would not make sense that he would want his estate to fall into intestacy as that would mean his estranged brother, Jack, would share in the Estate, which is something Victor expressly stated he did not want.

[68] This fixed and final intention includes revocation of the portions of the original type-written will which are crossed out, while maintaining the portions not crossed out as part of the new will.

[69] Therefore, I allow Malcolm Sweeney's application for proof in solemn form and declare the document a valid s. 8A Will.

Pierre Muise, J.