SUPREME COURT OF NOVA SCOTIA
Citation: *Mersey v. Mersey (Estate)*, 2023 NSSC 421

Date: 20231214
Docket: 519444
Registry: Bridgewater

Between:

Wendy Mersey

Applicant

v.

Estate of Earl George Mersey

Respondent

Judge:	The Honourable Justice Diane Rowe
Heard:	May 25, 2023, in Bridgewater, Nova Scotia
Oral Decision:	December 14, 2023
Counsel:	Jeffrey Waugh, for the Applicant Respondent, Self Represented

By the Court, orally:

[1] This is an application for proof in solemn form of a two page photocopy document headed the "Last Will and Testament of Earl Mersey" (Last Will) by Wendy Mersey, who seeks that it be admitted to Probate, with her appointment as executor. Mr. Earl Mersey died on July 14, 2021.

[2] The application was heard unopposed by persons who might have an interest in Mr. Mersey's Estate on May 25, 2023. This application was determined on the basis of the evidence and submissions of law of the applicant.

[3] Mr. Ivan Mersey and Mr. Bruce Mersey are brothers of the deceased. Neither of the brothers filed a notice of objection to the application, and both have been served by registered mail with the materials. Mr. Bruce Mersey had attended the motion for directions hearing on January 26, 2023 and did not seek to make any submissions, but was afforded time to file a notice of objection, as he was unrepresented by counsel. Mr. Bruce Mersey made no submissions to the Court in relation to this application either leading up to or during the course of the hearing.

[4] The Court notes that on December 13, 2023, it received a handwritten letter from Bruce Mersey. While it was received by the Court for filing, this letter was

not considered by the Court in any fashion in relation to the application for proof in solemn form.

[5] This application, with affidavits, was first filed on behalf of Ms. Mersey by a different counsel than the one who appeared and gave written and oral submissions.

[6] The Court notes that the content of the affidavits then filed by Ms. Mersey in support of her application required the Court to consider what evidence within them was admissible, or were inadmissible on the basis of relevance, opinion, or inadmissible hearsay. It has been careful to disregard those portions that are not admissible, while still considering their overall content to ensure that the entirety of the affidavits not be struck.

[7] Ms. Wendy Mersey is the former common law partner of the deceased and seeks to be appointed executor. She is also a beneficiary. Affidavit evidence was tendered by Ms. Wendey Mersey, consisting of an affidavit dated September 23, 2022, with supplemental affidavit, dated May 9, 2023.

[8] The Court is mindful of s. 45 of the *Evidence Act*, which provides as follows:

> **Competency and compellability at trial**

> **45** On the trial of any action, matter or proceeding in any court, the parties thereto, and the persons in whose behalf any such action, matter or proceeding is brought or instituted, or opposed, or defended, and the husbands and wives of such parties and persons, shall, except as hereinafter provided, be competent and compellable to give evidence, according to the practice of the court, on behalf of either or any of the parties to the action, matter or proceeding, provided that in any action or proceeding in any court, **by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, award or decision therein on his own testimony, or that of his wife, or of both of them, with respect to any dealing, transaction or agreement with the deceased, or with respect to any act, statement, acknowledgement or admission of the deceased, unless such testimony is corroborated by other material evidence.** R.S., c. 154, s. 45

[9] To that end, Ms. Mersey's affidavit evidence was relied upon for proof of a material fact at issue to the extent that there was corroboration by other witness' evidence. She had also entered affidavits from Mr. Warren McAuley, Ms. Joan McAuley, and Clifton Zwicker.

[10] Mr. Warren McAuley and Ms. Joan McAuley's affidavits were tendered in support of Ms. Mersey's application. It is noted that the McAuleys are not interested in the Estate, and, further to their affidavits, gave *viva voce* evidence in direct examination during the hearing of the application for proof in solemn form.

[11] Specifically, the affidavit of Clifton Zwicker was not relied upon in this proceeding. The Court notes that it is not drafted in accordance with the *Nova Scotia Civil Procedure Rules*, and associated caselaw, with opinion and hearsay throughout.

[12] The Court must decide whether there is sufficient evidence to meet the *Wills Act* requirements for a finding in writing, which is not compliant with formal requirements, to be a valid will, pursuant to s, 8A of the *Wills Act*. The Court notes that the applicant did withdraw an alternative argument that the Last Will satisfied the requirements of a holograph will pursuant to s. 6(2) of the *Wills Act*.

[13] There is also a second issue for the Court to consider in the application for proof in solemn form. The "Last Will" is a photocopy, as no original has been tendered. In the event that there is a finding that the Last Will is a valid Will, pursuant to the *Wills Act*, s. 8A, then the Court must consider whether the photocopied document can be admitted to Probate, a there is a legal presumption of revocation of the original Will that the applicant must rebut.

Is the "Last Will" a Valid Will?

[14] Section 8A of the *Wills Act* provides:

> **Writing not in compliance with formal requirements**
> 8A 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. 2006, c. 49, s. 2.

[15] Counsel for Ms. Mersey submitted that the Court consider *Hopgood v. Hopgood (Estate)*, 2018 NSSC 100 at para 75, as well as *Gibson Estate v. Shand* 2017 NSSC 68 when considering the evidence before it.

[16] McDougall, J. in *Hopgood, supra*, at para 75 states:

> [75] The requirement for corroboration in s. 45 is intended "to discourage dishonest or ill-founded claims against estates": *Johnson v. Nova Scotia Trust Co.*, (1973), 1973 CanLII 1233 (NS CA), 6 N.S.R. (2d) 88, 1973 CarswellNS 90 (N.S.S.C.(A.D.)). In *Murphy Estate (Re)*, (1998) 1998 CanLII 1312 (NS SC), 169 N.S.R. (2d) 284, [1998] N.S.J. No. 324, Justice Davison thoroughly reviewed the law concerning the corroboration required by s. 45. In so doing, he adopted the following list of principles compiled by O'Hearn Prob. Cr. J. in *Re McCarthy* (1970), 1970 CanLII 972 (NS PR), 16 D.L.R. (3d) 72:
>
> - Corroboration is of no avail if the claimant's story is not believed;
> - (b) A mere scintilla of corroborating evidence is not sufficient;
> - (c) Evidence that is consistent with two views or two opposing views is not corroboration of either.
> - (d) The corroborating evidence need not be sufficient in itself to establish the case.
> - (e) The direct testimony of the second witness is unnecessary for sufficient corroboration.
> - (f) The corroboration may be afforded by circumstances alone.

[17] Also, the Court in *Gibson Estate, supra*, at para 12, wrote "corroborative evidence may be in the form of circumstantial evidence and fair inferences of fact arising from proven facts."

[18] The burden is on the applicant to demonstrate, on the evidence, that on a balance of probabilities the Last Will embodies Earl Mersey's testamentary intentions.

[19] Duncan, J. writing in *Peters Estate (Re)*, 2015 NSSC 292 noted at paras 18 to 19 that the standard for testamentary intent and factors for a Court to consider when assessing whether a non-conforming writing is a valid and fully effective instrument pursuant to s. 8A is as follows:

> [18] The question to be posed is taken from the well-known case of *(Re) Gray Estate* 1958 CanLII 49 (SCC), [1958] S.C.R. 392, at page 396 and that is whether the note contains (and this is the operative language) *"a deliberate or fixed and final expression of intention as to the disposal of property upon death."* An alternate way of saying this is: does the note demonstrate testamentary intention or *animus testandi*? Evidence can be extrinsic evidence and/or found in the contents of the paper itself.
>
> [19] In looking at the cases that deal with determining the intent, a number of factors have been looked at, and these are not intended to be an all-inclusive list, but these are some of the things that one sees in looking at other cases where judges have had to consider these questions:
>
> - What is the degree of the formality of the language in the document?
> - Is it dated?
> - 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? (You have heard me in my preliminary comments about looking at the originals today and noting that there are some deletion in Note 3 that I will speak to a little bit later. Having the original document here allows me to better assess that type of issue.)
- Whether the document was on a form or is it entirely, as in these notes, in the handwriting of the testatrix.

So these are but a few factors the courts have looked at. I will consider as well what I see in the individual documents.

[20] I am going to canvass the evidence submitted to the Court in regard to the application for proof in solemn form, to determine whether it is appropriate for the Court to exercise its significant discretion to find validity in flawed documents. (*MacDonald v. MacDonald Estate* 2009 NSSC 323 at para 18).

Warren McAuley – Direct Examination plus his Affidavit

[21] Mr. McAuley's *viva voce* evidence was that he had known Mr. Mersey since they were both around four years old, growing up together in Feltzen South.

[22] Mr. McAuley stated that he had signed the "Last Will" document as a witness on September 10, 2020. That document header is, "This is the Last Will and Testament of me, Earl Geroge Mersey of Feltzen South in the Province of Nova Scotia made the 10th day of September 2020."

[23] Mr. McAuley's evidence on examination was that he did not see Mr. Mersey sign the "Last Will" by initialling the first page, although he did state that he was at

Mr. Mersey's home one day and he recalled signing the second page of a document which could be the "Last Will" as a witness. He stated that he did not read the document when he witnessed it, and presumes that it reflected what Mr. Mersey wanted. He did not state in his oral evidence to the Court that he saw Mr. Mersey signing or making a mark on the Last Will, which is not in his affidavit evidence.

[24] Mr. Mersey's affidavit evidence was that he believed Ms. Wendy Mersey had found the Last Will form online and that she filled in the spots indicating "Earl's specific intentions." There is nothing to support why he formed this belief.

[25] His recollection in the affidavit is that the Last Will was "possibly three pages" that were unstapled.

[26] Mr. McAuley's oral evidence was that he next signed a Power of Attorney document at a later time, a few days afterward, on September 15, 2020, as a witness. That document is headed as "Enduring Power of Attorney is giving [sic] by me, Earl G Mersey presently at Feltzen south Nova Scotia on the 10th day of September 2020." The "Power of Attorney" is signed in full at the end by Mr. Mersey, with each page initialled "EM."

[27] Mr. McAuley stated to the Court that he was not looking over Mr. Mersey's shoulder when Mr. Mersey signed the "Power of Attorney" document with full

signature. He did recall signing the Power of Attorney as a witness to Mr. Mersey's full signature.

[28] Mr. McAuley's affidavit evidence indicates that signing with an initial was a method Mr. Mersey would use from time to time when signing for RCMP documents regarding illegal alcohol offences. However, Mr. McAuley stated on direct examination that he was familiar with the content of Mr. Mersey's full signature, as he had seen Mr. Mersey sign his full signature on forms related to illegal possession for alcohol offences.

[29] His oral evidence was that he heard Mr. Mersey say, while Mr. McAuley was signing the Power of Attorney, that "Wendy is getting it all."

[30] When asked whether Mr. McAuley had ever asked why Mr. Mersey did not sign the Last Will with a full signature, as he had witnessed Mr. Mersey's full signature on the Power of Attorney, his answer was that he had never asked Mr. Mersey such a question.

[31] Mr. McAuley was a straightforward witness and brief. He did not elaborate before the Court, although his affidavit as filed contained irrelevant or hearsay material. His evidence on direct examination was not reliable in regard to Mr.

Mersey's usual practice of a full signature or initialling on signing documents, or to witnessing Mr. Mersey sign the Last Will.

Joan McAuley - Direct Examination plus her Affidavit

[32] Ms. McAuley's evidence was that she knew Mr. Mersey for about 25 years.

[33] The Court notes that her affidavit was brief, with the statement that she "read Warren's affidavit…I agree entirely with its content. I have nothing further to add regarding the subjects canvassed in Warren's affidavit." This is improper drafting, and does not work to simply add Warren's affidavit evidence, and is struck.

[34] Ms. McAuley's evidence is that she and her husband, Warren, would visit Earl, and they lived about three houses away from him. She recalled seeing him one or two times a month.

[35] Ms. McAuley's evidence was that when Mr. Mersey spoke about his property that "Wendy was to get everything…" She was not detailed on when this was said, but said it was "lots of times" and that he said something like this when she signed the "Last Will" as "he talked about it."

[36] Her next recollection was that Mr. Mersey had a copy of the Last Will that Wendy had prepared. Ms. McAuley was just at Mr. Mersey's for a visit. She then said she could not recall what Earl Mersey said about signing the Last Will or needing a witness.

[37] Ms. McAuley's evidence was that Wendy Mersey was not present at the signing. There were papers on the coffee table in Mr. Mersey's living room. She indicated that she had not read the documents she signed as a witness, and that Earl Mersey did not tell her where to sign but that she knew to sign on the last page as there was "a line."

[38] She could not recall whether she signed before or after Mr. Mersey had signed. She remembered Mr. Mersey writing on a page but could not remember seeing him signing this document. Ms. McAuley stated she did not see Mr. Mersey's full signature on the Last Will, and could not speak to whether he used initials or a full signature.

[39] When asked directly whether she saw Mr. Mersey initial the first page of the Last Will, she stated, flatly, no.

Wendy Mersey – Two Affidavits

[40] Ms. Mersey did not give oral evidence at the hearing.

[41] Ms. Mersey's two affidavits recount that Mr. Mersey entrusted her with his "papers." Her evidence was that they maintained a close relationship with each other, after they ended their intimate partnership, and she had moved in with another man, with her children at least eight years before Mr. Mersey's death.

[42] She stated that she had typed the Last Will for Mr. Mersey, and based it on "their intentions." She was not present when it was signed.

[43] Mr. Mersey's uncorroborated evidence is that she had the Last Will in her possession, and that Mr. Mersey sometimes would have it in his possession to "wave it around" at his brother Bruce. Finally, her evidence was that she last gave him the original and that she believed he was then going to obtain legal advice from a local lawyer, David Hirtle, to make a more formal Will. He then died.

[44] Her evidence was that she had made her best attempt at finding the original Last Will at Mr. Mersey's home but without success. Her Supplemental Affidavit attaches an exchange between her prior counsel to Mr. David Hirtle seeking confirmation of Mr. Mersey's meeting with him concerning a Will, and the Last Will, with a terse email response from Mr. Hirtle that "Your client has not been

appointed Executor of Mr. Mersey's Estate. Accordingly, it would not be appropriate for me to answer your inquiries [sic]."

[45] Mr. Hirtle was not subpoenaed in this proceeding, which would have assisted the Court. Mr. Hirtle's email statement is seen by the Court as not proving any material fact but simply of a statement having been made by him to Ms. Mersey's former counsel.

[46] The Last Will is appended to Ms. Mersey's first affidavit which is filed with the Court. It is brief and provides for a revocation of prior Wills. It provides for an appointment of Wendy Mersey as the executor with her daughter to be an alternate executor, in the event Wendy Mersey does not assume that role.

[47] It provides:

> I give my Executor the following POWERS:
>
> Full and complete power to do all the things necessary to carry out my wishes as set forth in this document and the absolute power to make final decisions, settle disputes, sell assets or distribute in kind, establish values and establish trusts if necessary.
>
> I DISTRIBUTE my assets as such:
>
> I give full Power to Wendy Mersey to control all my assets and other values [sic] keeping in mind our discussions concerning my wishes to always look after my Family members.
>
> Particularly my Brother, Bruce Mersey to see that he has what he needs to live a comfortable life within reason.

> I wish for my Personal Residence to go to Wendy Mersey. If for any reason Wendy is unable to take my Personal Residence, I wish for Matthew David Mersey to take sole Possession of my Home.

[48] This is all found on the first page of the Last Will. The initials "EM" are handwritten on the lower right corner of the first page. The second page is the execution page, which has "IN WITNESS whereof…" as the header and the signatures of Mr. Warren McAuley and Ms. Joan McAuley both printed and in cursive appearing.

[49] There is also a Power of Attorney appended to Ms. Mersey's Supplemental Affidavit. This is referenced in the evidence of Mr. Warren McAuley.

[50] This document is also informally drafted, with initials of "EM" on each page on the lower right hand side, and a full signature of Earl Mersey in cursive at the last page, with the full signature of Mr. Warren McAuley. There is a handwritten date of September 15, 2020 as the date of signature.

Analysis

1) Section 8A of the *Wills Act*

[51] The Last Will document does contain some formal language in keeping with the elements of a Will and it is typed in full. All of the witnesses indicate that Wendy Mersey had prepared the document.

[52] Mr. and Mrs. McAuley both alluded to Mr. Mersey saying to them that it, presumably his estate, was all going to Ms. Wendy Mersey. Mr. McAuley recalled this being said when the Power of Attorney was signed, five days after the Last Will was witnessed. Ms. McAuley's evidence is that she heard Mr. Mersey say this on the day she signed, but did not witness Mr. Mersey sign, the Last Will.

[53] However, there is no corresponding certainty in the document concerning this stated testamentary intent to give all to Wendy Mersey. It does not make any specific bequest to anyone other than Wendy Mersey, and this specifies she is to receive Mr. Mersey's personal residence in Feltzen South, and not "all of his estate." The vagueness concerning any bequest to his brother Bruce Mersey is not evidence of a settled testamentary intention, in this Court's view. There is no provision made for the residue of the Estate.

[54] As stated, it is acknowledged that Ms. Wendy Mersey drafted the Last Will, and she is requesting that the Court accept that it reflected Mr. Mersey's testamentary wishes. The evidence by the McAuleys is that Mr. Mersey stated, on

at least two different occasions during the week that the Power of Attorney and Last Will were signed, that Ms. Mersey was to get the entirety of his Estate, but this is not in keeping with the actual contents of the Last Will which, as stated before, make a vague allusion to Bruce Mersey that he "…has what he needs to live a comfortable life within reason," and specific bequest of the house in Feltzen South.

[55] Further, neither of the McAuleys gave evidence that they read the Last Will, and could not confirm its contents or whether they witnessed him signing this document. They each confirmed signing the last page of a document. Mr. McAuley stated in his affidavit that it was three pages, not two. Ms. McAuley was firmer in her oral evidence to the Court that she did not witness or see Mr. Mersey sign the document with a mark or at all.

[56] Further, there is some uncertainty concerning Mr. Mersey's mark forming a signature on the "Last Will." While the Court may look to similar or circumstantial evidence to support a finding that Mr. Mersey's initials are intended to be a "signature" as a "mark" (in keeping with the cases relied upon by the applicant in her brief to the Court, one of which references a case in which a testator had struggles with literacy) the mode of signature on the Power of Attorney document does not support that this is how Mr. Mersey would have signed such a significant

document as a Last Will. Mr. Mersey executed his Power of Attorney by initialling each page, and also making a full signature on the last page. It is not logical that he would be so scrupulous concerning formally signing a Power of Attorney but not in regard to the disposition of his Estate on death in a Last Will.

[57] Mr. McAuley's evidence on whether Mr. Mersey would, as a regular practice, sign with a mark of initials on official documents or with a full signature was not consistent, and therefore, not reliable. His evidence shifted in regard to seeing Mr. Mersey either sign in full or initial on RCMP alcohol offence documents in his affidavit and in his oral evidence before the Court.

[58] In considering the totality of the evidence before it, the Court does not find that there is evidence tending to prove, on a balance of probabilities, that the Last Will document put forward by the Applicant demonstrates proof of a settled testamentary disposition of Mr. Mersey sufficient for the exercise of its discretion to admit it as a valid will.

2) Photocopy

[59] In the alternative, if I had exercised my discretion to admit the Last Will as a valid will, then the Court was required to consider whether there was evidence that

the presumption against revocation has been rebutted by the Applicant, as it was a photocopy.

[60] The affidavit evidence before me is that Mr. and Mrs. McAuley saw Mr. Mersey sign a document by his mark on the first page, and that they witnessed it. They perceived that it was in Mr. Mersey's hands and they did not see it again.

[61] Ms. Mersey says that she held onto the Last Will, with other papers of Mr. Mersey's, but that she last gave the document to Mr. Mersey. Ms. Mersey's evidence in her affidavits, does indicate that Mr. Mersey had sought legal advice from a local solicitor, Mr. Hirtle, concerning his estate planning. The exchange between her former counsel and Mr. Hirtle support this statement. The Court has no more than that.

[62] There is no evidence that the Court can rely upon regarding the original's ultimate location and there is even some doubt even as to whether the original was two or three pages in length.

[63] The presumption concerning revocation must be rebutted by the Applicant. On this point, there is not reliable evidence presented to the Court. It is most probably that the original Will was in Earl Mersey's possession.

[64] It was possible for counsel for Ms. Mersey to have subpoenaed Mr. Hirtle to give evidence at the hearing, without intruding upon solicitor client privilege. The questions in the correspondence sent to Mr. Hirtle regarding whether Mr. Hirtle did or did not have an original of the Last Will document, and whether Mr. Hirtle did or did not observe whether Mr. Mersey had this document in his possession on a date certain could have been put to him.

[65] The burden of proof on the Applicant is not met with speculation from the counsel table, only, as to what might or might not have happened to the original as possibilities. There must be evidence that tends to make it more likely than not in these particular circumstances to rebut the presumption that Mr. Mersey had not revoked the Last Will, as the original document was more likely than not to have last been in his possession and obtained in connection with getting legal advice on his Estate.

[66] If Mr. Hirtle had been called as a witness by the Applicant in this proceeding to clarify his email statement, it might have assisted in determining whether the Last Will as an original, existed and if it did, whether it could be traced to either him or to Mr. Mersey.

[67] However, Mr. Hirtle's statement in his email does not refer to having an original of the Last Will document in his possession in his brief response to the Applicant's counsel. As noted, the Court cannot rely upon Mr. Hirtle's email statement for the truth of its contents, simply for it having been made, and notes that it is both cryptic and ambiguous.

Conclusion

[68] In considering the evidence before the Court, and the factors enumerated in *Peters, supra*, and other cases, the Court finds that the Last Will does not meet the requirements for the exercise of its discretion under s. 8A of the *Wills Act* to find the nonconforming photocopied document is a valid Will.

[69] The Court will not admit the Last Will to Probate. A copy of this decision will be sent to the Public Trustee by letter concerning the disposition of this matter, so that it may undertake further steps in administering Mr. Mersey's Estate. Further, the Registrar of Probate will forward a copy of the decision to interested persons in the Estate, specifically the family members of Mr. Mersey named in the proceedings to date.

[70] The Court recalls that Ms. Mersey has already made dispositions of property that is Mr. Mersey's Estate, including partial disbursement of an insurance policy

and has taking up property, in reliance on the Last Will being a valid Will. That will be subject to an accounting.

[71] The Applicant will bear her own costs.

Diane Rowe, J.