SUPREME COURT OF NOVA SCOTIA
Probate Court of Nova Scotia
Citation: Wittenberg Estate (Re), 2013 NSSC 324

Date: 20130925
Docket: Ken No. 396940
Probate No. 12641
Registry: Kentville

Richard Wittenberg

and

Estate of Gerda Wittenberg

Judge: The Honourable Justice Glen G. McDougall

Heard: July 22, 23, 24 and 31, 2013, in Kentville, Nova Scotia

Oral Decision: September 25, 2013

Written Decision: October 22, 2013

Counsel: Bernie Conway, Ll.B. and Jon Cuming, Ll.B.,
Robert Stewart, Q.C.

By the Court:

[1] Gerda Theodora Wittenberg died on or about the 14th day of February, 2012.

[2] Prior to her death the late Mrs. Wittenberg executed a document which purports to be her Last Will and Testament. It was signed by Mrs. Wittenberg and duly witnessed by two witnesses on the 22nd day of August, 2008.

[3] Subsequent to Mrs. Wittenberg's death her Will was presented to the Registrar of Probate for the County of Kings and a Grant of Probate, in Common Form, was issued on the 25th day of April, 2012.

[4] On June 8, 2012 Richard Wittenberg, son of the Late Gerda Theodora Wittenberg, filed a Notice of Application to have the Will proved in Solemn Form.

[5] Lawyers for the named Executrix, Linda Cashen, the daughter of the deceased testatrix, filed a Notice of Objection to the application for Proof in Solemn Form on the 11th day of October, 2012.

[6] The basis for Richard Wittenberg's challenge pertains to the Will's execution as well as concerns regarding the testatrix's testamentary capacity coupled with a suggestion of undue influence by the testratrix's daughter.

[7] The hearing to determine the Will's validity proceeded before me on July 22, 2013 and continued on July 23 and 24 before being adjourned for trial continuation on July 31st, 2013.

[8] The Will's proponents called three witnesses to testify to the manner of its execution and to address the issues of testamentary capacity and undue influence.

[9] After hearing from these three witnesses the focus turned to the party who launched the challenge. Richard Wittenberg was the sole witness called for the opposing side.

[10] When the matter reconvened on Wednesday, July 31st, 2013, counsel for the proponents sought permission to call a rebuttal witness.

[11] Counsel for the opposing side raised some concerns regarding the nature of the potential evidence that might be offered by this witness. He then requested a recess to discuss this development with his client.

[12] When the matter was reconvened counsel for the proponents, instead of calling his rebuttal witness, decided to make a motion for non-suit.

[13] Typically, motions for non-suit are brought by the defending party at the close of the plaintiff's case. In fact, the **Civil Procedure Rules** allow only for this. However, the principles that guide the law of non-suit are equally applicable to instances where a plaintiff or applicant alleges that a defendant or respondent has not met an evidentiary burden that rests on that party. There is no reason for precluding

the proponents of the Will from requesting that I assess the sufficiency of the evidence to establish the respondent's claims prior to making final findings of fact.

[14] The proponents' motion for a "directed verdict" is in essence a request for judicial assessment of the sufficiency of the respondent's evidence prior to a finding of fact. More specifically, the applicant alleges that the respondent failed to meet its burden to rebut the presumption that the Will was properly executed.

[15] The burden of proof in probate cases was succinctly and properly summarized in the pre-hearing brief of the Executrix, Linda Cashen, and as such I will not repeat it in detail. (See pp. 4 to 8 of the proponents pre-hearing brief for a full explanation.)

[16] The leading case from the Supreme Court of Canada is **Vout v. Hay**, [1995] S.C.J. No. 58, which has been adopted by Nova Scotia courts. That case solidified the following points of law:

1) The proponents of a Will have the legal burden to prove its proper execution, including knowledge, approval and testamentary capacity.

2) Once it is proven that the Will was duly executed with all of the requisite formalities, there is a presumption that the testator knew and approved of its contents, and had the mental capacity to create the Will.

3) If there are any suspicious circumstances surrounding the creation of the Will or the mental capacity of the testatrix, then the presumption will be spent and the proponents of the Will must prove that the Will was duly executed despite any semblance of suspicion.

4) The doctrine of "suspicious circumstances" **places an evidentiary burden on the party attacking the Will** to show that there is some evidence which would call into doubt the knowledge, approval or testamentary capacity of the testatrix. Doing so shifts the burden back to the proponents of the Will.

5) Unlike the "suspicious circumstances" doctrine, an allegation of undue influence must be proven on a balance of probabilities by the party making the allegation.

[17] The applicant in this case is claiming both suspicious circumstances surrounding the testamentary capacity of the testatrix and undue influence exerted by the applicant Linda Cashen. Therefore, he has two separate burdens to meet:

1) An **evidentiary burden** to prove suspicious circumstances. As the Supreme Court of Canada explained in **Vout** v. **Hay**, *supra*: "This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity."

2) A **legal burden** to prove, on a balance of probabilities, that the testatrix was unduly influenced by Linda Cashen when creating her Will.

[18] In claiming that the respondent has not met his burden to rebut the presumption of proper execution of the Will, the applicant is alleging that, based on the record thus far in the proceedings, the evidence cannot establish that either burden can be met.

[19] A motion for non-suit is one particular instance in which a judge is asked to assess the sufficiency of the evidence before making an ultimate finding of fact (or, putting the question to the jury if that is the applicable situation). Only a defendant in a civil trial can bring a motion for non-suit which they must do after the plaintiff has concluded their evidence. This is established by the Nova Scotia **Civil Procedure Rules**. Rule 51.06(1) states:

> **Non suit**
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> 51.06 (1) At the close of the plaintiff's case and before the defendant elects whether to open the defendant's case and present evidence, the defendant may make a motion for dismissal of the proceeding, or a claim in the proceeding, on the ground that there is no evidence on which a properly instructed jury could find for the plaintiff.
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> (2) A defendant who unsuccessfully makes a motion for a non suit must elect whether to open the defendant's case and call evidence when the motion is dismissed.

[20] The law of non-suit in Nova Scotia is settled and straightforward. It is best summarized from the following passage in **Johansson v. General Motors of Canada Ltd.**, 2012 N.S.C.A. 120. At para. 27:

27 In *Herman v. Woodworth*, Justice Flinn (para. 4), more expansively, adopted the following from Sopinka's *The Law of Evidence in Civil Cases*:

> ... If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it. [Justice Flinn's emphasis]

28 The seminal statement of the demarcation between the functions of judge and jury is Lord Cairns' passage in *Metropolitan Railway Co. v. Jackson* (1877), 3 App. Cas. 193 (H.L.), at p. 197:

> The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. [Lord Cairns' emphasis]

The Supreme Court of Canada repeatedly has adopted Lord Cairns' statement: *The King v. Morabito*, [1949] S.C.R. 172, at p. 174; *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, at para. 54, per McIntyre, J. for the majority; *R. v. Arcuri*, [2001] 2 S.C.R. 828, at para. 24, per McLachlin, C.J.C. for the Court.

29 As to other provinces, in *Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*, [2007] O.J. No. 2297 (Q.L.) (C.A.), Justice Laskin for the Court said:

> 35 On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must

> assign "the most favourable meaning" to evidence capable of giving rise to competing inferences. This court discussed this latter principle in *Hall et al. v. Pemberton* (1974), 5 O.R. (2d) 438, at 438-9, quoting *Parfitt v. Lawless* (1872), 41 L.J.P. and M. 68 at 71-72:
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> > I conceive, therefore, that in judging whether there is in any case evidence for a jury the Judge must weigh the evidence given, must assign what he conceives to be the most favourable meaning which can reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue.
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> > ...
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> > From every fact that is proved, legitimate and reasonable inferences may of course be drawn, and all that is fairly deducible from the evidence is as much proved, for the purpose of a *prima facie* case, as if it had been proved directly. I conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the Court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.
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> 36 In other words, on a non-suit motion the trial judge should not determine whether the competing inferences available to the defendant on the evidence rebut the plaintiff's *prima facie* case. The trial judge should make that determination at the end of the trial, not on the non-suit motion. See John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths Canada, 1999) at 139.
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> 30 In *Capital Estate Planning Corp. v. Lynch*, [2011] A.J. No. 820, para. 19, the Alberta Court of Appeal described Justice Laskin's statement from *Prudential Securities* as "[t]he definitive test on a non-suit motion".
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> 31 In my view, all the above statements are consistent and authoritative, and vary only in the nuances of expressing the governing principle.

[21] This passage from **Johansson**, *supra,* was recently cited with approval in two Nova Scotia Court of Appeal decisions in the past year: **Poulain v. Iannetti**, 2013

N.S.C.A. 10, and **Shane v. 3104854 Nova Scotia Ltd.**, 2013 N.S.C.A. 84. In **Shane**, *supra,* Chief Justice MacDonald recognized that the above passage from **Johansson**, *supra,* merely reiterated the long-standing law of non-suit motions in Nova Scotia. (See para. 21)

[22] Chief Justice MacDonald usefully sums up the test for non-suit in the following manner:

> 20 Several points can be taken from these passages. First, a trial judge hearing a non suit motion merely decides *if* a trier of fact *could* draw a requested inference from the plaintiff's evidence. The trial judge does not weigh the evidence on a non suit motion; that is for the trier of fact at the end of trial. On a non suit motion, the trial judge must assume that the evidence is true and must ascribe the "most favourable meaning to it". Any competing inferences put forward by the defendant are to be weighed with all of the evidence at the end of trial. Finally, the ordinary burdens continue to apply even where a plaintiff survives a non suit motion. That is, once all of the evidence is heard, the trier of fact must decide whether the plaintiff has proven its case on a balance of probabilities and this includes deciding whether circumstantial evidence is sufficient to draw a requested inference as to causation or liability.

[23] A non-suit motion is merely a request by a defendant for a trial judge to assess the sufficiency of the evidence in establishing offered the plaintiff's case. It is one particular circumstance in which trial judges assess the sufficiency of evidence; there are many other circumstances where judges conduct similar analyses.

[24] In the present case, the Will's proponents cannot bring a motion for non-suit. It is not provided for in the Rules nor by the definition of a non-suit motion. To understand why, consider the Newfoundland case of **Adams v. Adams**, 1997 CarswellNfld 109.

[25] **Adams**, *surpa,* is also a case of Proof in Solemn Form of a Will. In that case, the plaintiff, who was the proponent of the Will, presented evidence to prove that it was properly executed. When the plaintiff had finished presenting his evidence, the defendant moved to have the case non-suited. The judge reviewed the evidence and found that there was sufficient evidence by which the plaintiff could succeed in his claim. After this, the defendant elected to give evidence to put forward his claim of undue influence.

[26] The motion as brought in **Adams**, *supra,* is the correct form of a non-suit motion. If the defendant had succeeded, the entire trial would have been dismissed. The same thing cannot be said in the present case. The proponents of the Will are the ones responsible for proving the Will in solemn form and they are also the party making the motion to assess the sufficiency of the evidence in respect to the respondent's claims. Even if I find that there is indeed no evidentiary grounding to prove either suspicious circumstances or undue influence, the case cannot be concluded. I still have to find that the proponents have proved that the Will was properly executed even if this is a relatively easy thing to prove given the presumption of knowledge, approval and testamentary capacity that applies.

[27] So if the proponents cannot bring a non-suit motion the question then becomes: "Are they still capable of bringing a motion requesting the assessment of the sufficiency of the evidence?" I believe they can. The difference between a non-suit and a motion to have a particular issue withdrawn for lack of evidence is merely the overall impact it might have on the case.

[28] Halsbury's *Laws of Canada* contains the following passage in its section on non-suit:

> Although the plaintiff cannot move to non-suit the defendant, where the defendant bears an evidential burden on an issue, the plaintiff can move to have that issue withdrawn from the trier of fact. For example, if the defendant in a defamation action asserts the defence of responsible communication on matters of public interest, the plaintiff can move for an order ruling out the defence on the ground that the evidence before the trier of fact is not capable of supporting it. A successful motion of this kind is essentially equivalent to "non-suiting" the defendant on the issue in question (though not on the other issues in the case).

[29] The above passage in Halsbury's refers to the Supreme Court of Canada decision in **Grant v. Torstar**, 2009 S.C.C. 61, at paras 127, 129, which states:

> 127 As a general rule, the judge decides questions of law, while the jury decides questions of fact and applies the law to the facts. As is the case in other actions, for example negligence trials, issues of fact and law cannot be entirely disentangled. Nevertheless, it is possible to arrive at the following allocation of responsibility on the defence of responsible communication, having regard to whether the issue is predominantly legal or factual, to the traditional allocations of responsibility in defamation trials, and to relevant legislation.

…

> 129 As in any trial by judge and jury, the judge may, upon motion, rule out the defence on the basis that the facts as proved are incapable of supporting the inference of responsible communication. This is consistent with the power of the judge in existing jurisprudence to withdraw the issue of malice from the jury where there is no basis for an inference of malice on the evidence. (emphasis added)

[30] The Court makes it clear in the above passage from **Grant v. Torstar**, *supra,* that any party can move to have an issue withdrawn in a trial by judge and jury. But there is no principled reason why the same cannot be done in a trial by judge alone.

[31] The Supreme Court of Nova Scotia, Appeal Division, as it was then known, provides further authority for this proposition in the case of **J.W. Cowie Engineering Ltd. v. Allen**, [1982] N.S.J. No. 39 (C.A.). In that case, Justice Jones cited the following passage from Cross on *Evidence* at para 13:

> Cross in his text on Evidence (4th ed., 1974), comments on the rules at p. 66:
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> > The test to be applied by the judge in order to determine whether there is sufficient evidence in favour of the proponent of an issue, is for him to enquire whether there is evidence which, if uncontradicted, would justify men of ordinary reason and fairness in affirming the proposition which the proponent is bound to maintain, having regard to the degree of proof demanded by the law with regard to the particular issue. This test is easy to apply when the evidence is direct, for the question whether witnesses are to be believed must be left to the jury, but it is necessarily somewhat vague when circumstantial evidence has to be considered. In that case, little more can be done than inquire whether the proponent's evidence warrants an inference of the facts in issue, or whether it merely leads to conjecture concerning them.
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> > Although the judge may withdraw an issue from the jury of his own motion, questions of the sufficiency of evidence are usually raised on a submission that there is no case to answer made by the opponent of the issue. When ruling on such a submission, the judge assumes that the proponent's witnesses are telling the truth in cross-examination, as well as in their evidence-in-chief, and on matters which are unfavourable to the proponent, as well as those which are in his favour. He may rule in favour of the submissions either because the proponent's evidence discloses no case as a

> matter of law or else because of the weakness of the proponent's evidence. If the judge rules against the submission, the issue must be determined by the jury, but, even when the opponent calls no evidence, their decision will not necessarily be in favour of the proponent. The jury may disbelieve the testimony given on his behalf, or, if they do accept it, they may not be prepared to draw the requisite inference."

[32] The language of this passage from **Cross**, *supra*, as adopted by the Nova Scotia Supreme Court, Appeal Division, shows unequivocally that either party to a proceeding can challenge the sufficiency of the evidence to ground a claim made by the other party. Either party can move to have the judge assess the sufficiency of evidence on an issue to which the other party bears the burden of proof. On this view of the law, notwithstanding that the **Civil Procedure Rules** are silent on the issue, there is common law authority by which an applicant can challenge the sufficiency of a claim made by the opposing side.

[33] Given that such a motion is permissible, then the test for granting the motion should be no different than the test for non-suit. A non-suit is only one specific instance in which a judge assesses the sufficiency of evidence which, if granted, typically results in an entire case being dismissed. In a motion to have an issue withdrawn in favour of the applicant or plaintiff, the test should be the same. The judge must be satisfied that the respondent or defendant did not present sufficient evidence such that a reasonable trier of fact, viewing the evidence in the most favourable way, could find that the defendant or respondent could meet their burden of proof.

[34] There is one additional complication in this case. Normally in a non-suit motion, the judge will assess the sufficiency of a plaintiff's case only on the view of the plaintiff's evidence. But in this case, both sides have already given evidence. So, do you assess only the respondent's evidence in determining whether he can make his claims of suspicious circumstances and undue influence or do you assess the entire record?

[35] The Sopinka and Lederman text, *The Law of Evidence in Civil Cases*, Toronto: Butterworths, 1974, at p. 523, is helpful in addressing this point. The authors explain that, as of writing their text, the procedures for a non-suit motion in Ontario were different than they are currently in Nova Scotia. In Ontario at the time, a defendant who brought a non-suit motion had to elect immediately upon bringing the motion

whether or not to give evidence. If they elected to give evidence, the non-suit would not be decided until after the defendants had given their evidence. In these circumstances, the authors explain a non-suit motion as follows:

> In Ontario, if the defendant elects to call and does call evidence, the trial then proceeds normally and when all the evidence of both the plaintiff and the defendant has been put in, the defendant may renew his motion for a non-suit. The trial judge then makes his decision on the non-suit motion on the basis of all the evidence led in the trial. Thus, if the defendant's evidence, in part, assists the plaintiff in establishing a *prima facie* case, that evidence is to be considered along with the plaintiff's evidence by the trial judge in deciding whether or not there is a sufficient quantum of probative evidence before the court. (emphasis added)

[36] While this is not the procedure for a non-suit motion in Nova Scotia, the above approach is sensible. If there is evidence on the record, it should factor into the consideration of the sufficiency of evidence on any given issue. Therefore, in assessing the sufficiency of the respondent's evidence in this case, one should look at the entire record and not just the respondent's own testimony.

[37] To summarize matters, the respondent is making two claims which have different burdens of proof. He is alleging "suspicious circumstances" surrounding the creation of the Will - chiefly that his mother, the testatrix, showed some signs of testamentary incapacity such that she was not capable of making a Will. He has an **evidentiary burden** to give some evidence which tends to support this conclusion. If he can do so, the burden shifts back to the proponents of the Will to ultimately satisfy the Court that the testatrix was capable. The second claim is that the testatrix was unduly influenced by Linda Cashen. He has the **legal burden** to prove this allegation on a balance of probabilities.

[38] The proponents of the Will ask that both of these issues be withdrawn for lack of evidentiary support. I have to decide whether there is sufficient evidence on the record - in both the respondent's and the proponents' evidence - that if believed and if viewed in the most favourable light possible, the respondent could succeed in meeting his burden in relation to these issues. This is a question of law.

[39] It is open to me to find that both issues should be withdrawn, that neither of them should be withdrawn or that one of the two should be withdrawn. For example, I may find that the evidentiary record does not support an argument of undue

influence and then refuse to address that issue when weighing the facts yet I may still wish to weigh the facts to ultimately determine whether there are "suspicious circumstances" such that the initial presumption of testamentary capacity should be spent.

[40] If I find that both issues ought to be withdrawn, it is likely that this simply brings an end to the proceedings in favour of the applicant. While legally, they are still required to prove the Will in solemn form, short of any "suspicious circumstances" all they have to prove is that the Will was properly sworn with all the requisite formalities and then the presumption of knowledge, approval and testamentary capacity kicks in. It does not appear that the formalities behind the swearing of the Will are in issue in this case. Therefore, absent a claim of "suspicious circumstances" or undue influence, there are no contentious issues.

[41] However, it is worth keeping in mind that the respondent only has an evidentiary burden to point to some evidence that, if accepted, shows suspicious circumstances. This is a very low burden to meet. I may find ultimately that I do not believe the respondent's testimony or do not give it much weight. However, at this stage, I must only ask whether it is possible that the respondent's evidence can show "suspicious circumstances". I would venture to say that it would be the rare case in which somebody attacking a Will could not raise at lease some evidence of suspicious circumstances as a matter of law.

RULING:

[42] Without commenting on the relative strength of the proponents' versus the respondent's case, I do not feel it is appropriate to grant the motion for non-suit as it pertains to either testamentary capacity or undue influence.

[43] The respondent can point to some evidence of "suspicious circumstances" and, short of assessing and assigning weight to the evidence related to the assertion of undue influence, the Court cannot rule on this aspect of the motion either.

[44] That determination can only be made once all the evidence has been presented or tendered, as the case may be, and only then can the Court assess that evidence and give it the weight that it deserves.

[45] Should the Will's proponents wish to offer rebuttal evidence, I will permit counsel to call further witnesses.

Justice Glen G. McDougall