Date: 20010918
Docket: Probate No. 51157

**PROVINCE OF NOVA SCOTIA )**
**)** **IN THE COURT OF PROBATE**
**COUNTY OF HALIFAX )**

[CITE: Johnson Estate (Re), 2001 NSSC 133]

**IN THE MATTER OF:** **the Estate of ORLAND EARL JOHNSON, late of Halifax, in the County of Halifax and Province of Nova Scotia**

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**D E C I S I O N**

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**HEARD:** **At Halifax, Nova Scotia, before the Honourable Justice C. Richard Coughlan, on April 3rd and 6th, 2001**

**DATE OF DECISION:** **September 18th, 2001**

**COUNSEL:** **R. Peter Muttart, Q.C., for the Applicant**
**J. D. F. Theakston, Q.C., for the Respondent**

**COUGHLAN, J.:**

[1] This is a case which shows the importance of consulting a lawyer when preparing a will.

[2] Orland Johnson died on August 4th, 2000. On the day he died he signed two documents to be his will. The documents were prepared by Carolyn Johnson, his half-sister, and William Davis, his brother-in-law, and signed at his home shortly before his death. Ms. Johnson disputes that one of the documents is part of his will and asked for proof in solemn form. Mr. Davis, as executor, seeks proof in solemn form of both documents as Orland Johnson's last will and testament.

[3] The questions for the court in this application are: Were the required formalities of execution of the will fulfilled? Did Orland Johnson have testamentary capacity? Were the blanks filled in on the handwritten document when it was executed by Mr. Johnson? Did Mr. Johnson have the necessary knowledge and approval of the contents of the will? Both the printed will form and the handwritten document having revocation clauses, did the execution of both revoke the first document signed?

**SERVICE**

[4] The notice of the application to be given is set out in the **Probate Act**, R.S.N.S. 1989 c. 359. Mr. Muttart filed an affidavit dated April 6th, 2001 stating the citation was advertised in the Royal Gazette for a period of three months commencing December 13th, 2000 and served on Judith Pierce-Martin, Brian Johnson and Carolyn Johnson by registered post, dated and posted December 12th, 2000.

[5] Section 36(2)(e) of the **Act** requires personal service on the heirs resident in the Province. As Brian Johnson and Carolyn Johnson, the heirs resident in Nova Scotia, were in attendance at the commencement of the application, thereby having knowledge of the application and not making an objection to the service, the application can proceed despite the lack of personal service.

[6] I also find the advertising and service on Judith Pierce-Martin was appropriate, pursuant to s. 36(2)(f) of the **Act**.

**FACTS**

**[7]** Orland Johnson was married to Maureen Johnson who predeceased him. Prior to his wife's death he made a will dated April 30th, 1993. The will left all his property to his trustee to pay his debts and transfer the residue of his estate to his wife if she survived him for a period of thirty days. In the event of his wife's death he made certain gifts to named individuals, including William and Lorna Davis, and the residue of his estate to William and Lorna Davis and his half-sister, Judith Belcourt, now Judith Pierce-Martin.

[8] Mr. Johnson's closest relatives were his half-sister, Judith Pierce-Martin (an adopted daughter of his mother, Myrtle Johnson, and his stepfather, Bruce Stretch), and Carolyn Johnson and Brian Johnson, his half-sister and half-brother (children of his father, Orland Johnson Sr., and his father's second wife, Gladys Johnson).

[9] Mr. Johnson and his wife, Maureen, had a close relationship with Maureen's brother, William Davis, and his wife, Lorna Davis. Before Maureen's death, the Johnsons and the Davis' travelled and spent time together. After Maureen Johnson's death, the Davis' and Mr. Johnson saw each other every month or two and telephoned weekly or every two weeks. Lorrie George Barkhouse testified he had a long friendship with Mr. Johnson and in earlier years he and his wife socialized with Orland and Maureen Johnson and Bill and Lorna Davis.

[10] Mr. Johnson became ill in 2000. He had a severe liver problem. He was hospitalized several times. He was not a candidate for a liver transplant and was finally discharged on July 31st, 2000. On July 29th, 2000, Carolyn Johnson went to Mr. Johnson's home, she knew Mr. Johnson was going to be coming home. She had been a licensed practical nurse but not licensed since approximately 1993. She wanted to prepare the home for Mr. Johnson's return. The house key was in the mailbox. She found Mr. Johnson's 1993 will the second day she was in the house. She brought with her all her paperwork to arrange her income tax, including copies of her will and her son's will.

[11] Carolyn Johnson testified a day or two after Orland Johnson came home she asked if he wanted to make a new will. She contacted a solicitor in Sackville and told him of Orland Johnson's condition and asked him to come to Mr. Johnson's residence. The solicitor could not come. The lawyer told her the will had to be witnessed by two persons. She prepared a handwritten will.

[12] The day Mr. Johnson died, August 4th, 2000, Carolyn Johnson called Mr. and Mrs. Davis and told them a new will had to be prepared now. The

Davis' arrived at Mr. Johnson's residence. Mr. Davis purchased a will kit from Staples and brought it with them.

[13] Orland Johnson wanted to go to his bank. Arrangements were made and Mr. Johnson was driven to the bank and his safety deposit box was brought out to the car as he could not get into the bank.

[14] After returning from the bank, there are different versions as to what took place. Mrs. Lorna Davis testified lunch was made. After lunch Orland Johnson slept and then tried to sit up. Carolyn Johnson gave him his puffer and medication. Mr. Johnson went into his bedroom and Mrs. Davis spoke to him. She said, "Carolyn wants you to make a new will" and asked him if he wanted to make a new will and he responded he thought he should. He stated, "Carolyn wanted the things that had belonged to her father and Judy was to get the things that had been her mother's". They discussed what else Carolyn should get and Mr. Johnnson decided to give her his car.

[15] Mrs. Davis went and told her husband and Carolyn what Orland wanted and they completed the will. Mr. Johnson then came from the bedroom into the den and Carolyn and Bill read the will to Mr. Johnson.

[16] Deborah Belfield and Lionel Belfield came to the house to witness the will. Orland Johnson said, "Now where do I sign." According to Mrs. Davis' recollection, at the time the will was signed Orland was sitting on the chesterfield with Carolyn next to him and Bill in a chair. The papers were on the coffee table. Orland signed the will first and she thinks Debbie next and then Lionel.

[17] William Davis testified his wife told he and Carolyn what Orland wanted in his will and he and Carolyn Johnson sat down and prepared the will at the kitchen table. They had the will kit Mr. Davis had purchased and the handwritten will Carolyn Johnson had drafted. Mr. Davis and Ms. Johnson were sitting beside each other. They completed the will form Mr. Davis had purchased at Staples. Mr. Davis then filled in the blanks on the handwritten will Ms. Johnson had prepared. Mr. Davis did all the writing. Mr. Davis read provisions of the will as he completed them in Ms. Johnson's presence.

[18] Mr. Davis then read both the will form he had purchased and Ms. Johnson's handwritten will to Orland Johnson in the presence of Carolyn Johnson. Orland Johnson initialled the paragraphs after they had been read. The "✓" (checkmark) after the words "I nominate and appoint" in the handwritten document, the words "see copy of will" and "my brother-in-law, William A.

Davis" were on the handwritten document at the time it was read over to and signed by Orland Johnson.

[19] Mr. Davis said at the time of the signing by Orland Johnson present were himself, Lorna Davis, Carolyn Johnson, Deborah Belfield and Lionel Belfield. Mr. Johnson was in good condition during lunch - telling jokes and having a good conversation. Mid-afternoon Orland laid down. Even after the will was signed he was talking and joking with Mr. and Mrs. Belfield and their children until he had to go to the bathroom. Mr. Johnson was weak, he was helped to his bed and shortly thereafter died.

[20] It did not occur to Mr. Davis that one of the documents revoked the other. Mr. Davis gave very uncertain evidence that the printed will he had brought with him was signed before the handwritten document.

[21] Carolyn Johnson testified she and Mr. Davis spoke about Orland's will. She showed Mr. Davis her handwritten will and he had the printed will form. Ms. Johnson told Mr. Davis the two of them were to be the executors of Orland's will; the things that belonged to Judith's mother were to go to Judith; the things of Maureen Johnson were to go to William Davis; the things of Carolyn's father were to go to Carolyn Johnson; William Davis was to get Orland's house; Carolyn Johnson was to get Orland's car and the residue of the estate.

[22] She dictated to Mr. Davis in sight and hearing of Orland Johnson. Orland could see and hear Carolyn and Mr. Davis. She thought there was no residue of the estate, although she was aware of a $40,000.00 life insurance policy, probably payable to the estate. Ms. Johnson told Mr. Davis to fill out the will. Mr. Davis filled out the printed will form document in Ms. Johnson's presence. Ms. Johnson did not read the printed form will after it was filled in by Mr. Davis.

[23] After the printed will form was completed, Mr. Johnson was brought to the living room. Ms. Johnson did not read what Mr. Davis had written at any time before Orland signed. Mr. Davis read the will to Orland and said he and Ms. Johnson would be executors and the residue was to go to Carolyn Johnson. Orland initialled every paragraph in which something was filled in. Carolyn went to the neighbour's and asked them if they would witness the will. Orland knew what was going on, had a conversation with everybody, told jokes. Mr. Johnson signed the printed form will in the presence of the witnesses and the witnesses signed the will.

[24] Then Mr. Davis brought in the handwritten document and told Orland, "sign this". Orland signed the handwritten document and it was witnessed.

There was nothing in the handwritten document other than Ms. Johnson's handwriting. The blanks were not filled in when the handwritten document was signed. Ms. Johnson had not read the document before it was signed. The handwritten document had been set aside until it was brought in to Mr. Johnson by Mr. Davis.

[25] The witnesses to the documents also testified. Mrs. Deborah Belfield was a neighbour of Mr. Johnson and knew him for many years. They were good friends. She testified on the day of Mr. Johnson's death Lorna Davis came to her house and asked she and her husband, Lionel Belfield, to witness a will. She and her husband went to the Johnson residence. Orland Johnson was present, as well as William and Lorna Davis and Orland's half-sister, Carolyn Johnson. Mr. Johnson knew what he was doing - he knew he was signing a will.

[26] Mrs. Belfield thought Mr. Johnson said, "I should have done this before". She did not remember Orland Johnson signing the will. She did not remember Orland Johnson initialling the will. She did not remember the will being read. She did not recognize the signature of the person making the will. She did not know Orland Johnson's signature. She did identify her signature and initials, and the signature and initials of her husband on the documents. Mr. Johnson was present when she and her husband witnessed the documents.

[27] She does not remember if the "✓" was on the handwritten document when she witnessed it. She does not remember if the words "see copy of will" and "my brother-in-law, William A. Davis" were on the handwritten document when she signed it.

[28] Mr. Lionel Belfield testified he was a friend of Orland Johnson. He and his wife were asked to witness Mr. Johnson's will. The documents were signed before he and his wife arrived at the Johnson residence. Mr. Johnson was sitting on the couch. There was a coffee table between Mr. Johnson and Mr. and Mrs. Belfield. Mr. Johnson's sister was sitting next to him, rubbing his back. The documents, both printed will form and handwritten document, were on the coffee table. A pen was passed back and forth between Mr. Johnson, Mr. Belfield, Mrs. Belfield and Mr. Davis.

[29] He did not remember Mr. Johnson signing the documents. Mr. Belfield identified Mr. Johnson's signature and initials, as well as the signatures and initials of himself and his wife on the documents. The documents were not read to Mr. Johnson while Mr. Belfield was present and he did not remember if Mr. Johnson had read the will.

[30] He testified he and his wife spent some time in normal conversation with those present before the will was signed, as well as after it was signed. Mr. Belfield was surprised Mr. Johnson died that day as he was sitting up, joking and talking. Mr. Johnson wanted the will signed as he was there with the documents waiting for Mr. and Mrs. Belfield to witness them. Mr. Belfield signed both the printed will form as well as the handwritten document. He considered the two documents to be one will. He signed all documents as if it was one will.

[31] Mr. Belfield does not know if the "✓" after the words "I nominate and appoint" in the handwritten document was present when the will was signed. He does not remember if the words "see copy of will" and "my brother-in-law, William A. Davis" were on the handwritten document when he signed it.

**FORMALITIES FOR EXECUTION**

[32] Section 6 of the **Wills Act** sets out the formalities for the execution of a will. The testator's signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time. The witnesses then have to subscribe the will in the testator's presence. Here, aside from any presumption of regular execution, the witnesses do not remember Mr. Johnson signing the will.

[33] Mr. Belfield stated the documents were signed before he and his wife arrived at the Johnson residence. Was there an acknowledgment by Mr. Johnson of his signature? Mr. Belfield knew and recognized Mr. Johnson's signature and initials. The documents, both printed will form and handwritten document, were on the coffee table between Mr. Johnson and Mr. and Mrs. Belfield. A pen was passed back and forth between Mr. Johnson, Mr. Belfield, Mrs. Belfield and Mr. Davis. Mr. Johnson was talking and joking with the Belfields. Mr. and Mrs. Belfield were asked to witness the will in Mr. Johnson's presence. Mr. Belfield testified Mr. Johnson wanted the documents signed. He was present with the documents, waiting for them to be witnessed. Both Mr. and Mrs. Belfield signed and initialled all documents in Mr. Johnson's presence.

[34] The question of what is necessary as an acknowledgment of the signature was dealt with in the case of **Daintree and Butcher v. Fasulo** (1888), 13 P.D. 102 where Cotton, L.J., giving the decision of the Court of Appeal, stated at p. 103:

> ... Now it is admitted law that it is not necessary for the testator to say "this is my signature," but if it is placed so that the witnesses can see it, and what takes place involves an acknowledgment by the testator that the signature is his, that is enough. In my opinion, when the paper bearing the signature of the testatrix was put before two persons who were asked by her or in her presence to sign as witnesses that was an acknowledgment of the signature by her. ...

[35] I find there was the required acknowledgment by Mr. Johnson to his signature on both documents to the witnesses, and the witnesses subscribed the documents in the presence of Mr. Johnson.

[36] Mr. and Mrs. Belfield did not sign the handwritten document, but initialled the document opposite Mr. Johnson's signature. Such initials are sufficient for the proper execution of the document. **Canadian Law of Wills, (3rd),** Thomas G. Feeney at p. 96 states:

> ... As in the case of the testator's signature, initials or a mark will suffice for the witnesses' signatures and it is no objection that the subscription is in the wrong name or a mere description of the witness.

[37] I find that the manner of execution of the documents is sufficient to fulfil the requirements for the execution of wills pursuant to the **Wills Act**.

## TESTAMENTARY CAPACITY

[38] I find that Orland Johnson had testamentary capacity at the time of the execution of the documents on August 4th, 2000. No one disputes that he had testamentary capacity. The evidence is clear from all witnesses that he had the necessary capacity up to the time of his death, carrying on conversation and joking, knowing what he wanted to do.

[39] I find that Orland Johnson had a disposing mind and memory as defined by Rand, J. in **Leger v. Poirier**, [1944] 3 D.L.R. 1 (S.C.C.) at p. 11:

> ... A "disposing mind and memory" is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like ...

## HANDWRITTEN DOCUMENT

[40] Ms. Carolyn Johnson says that at the time the handwritten document was signed the blanks were not filled. If the printed words "see copy of will" and "my brother-in-law, William A. Davis" and the "✓" after the words "I nominate and appoint" were added to the handwritten document after Mr. Johnson signed it, the document would be invalid as a will. (**Kennedy v. MacEachern** (1978), 27 N.S.R. (2d) 329 (N.S.S.C.-A.D.)). Neither Mr. nor Mrs. Belfield remember if the blanks were filled in at the time of signing. Mr. Davis says the blanks were filled in and the completed document read to both Carolyn Johnson and Orland Johnson. Ms. Johnson says the blanks were not filled in at the time of signing, that the handwritten document was brought in by Mr. Davis after the printed will form was signed.

[41] I accept Mr. Davis' version of what took place in preference to that of Ms. Johnson and, in reaching such conclusion, considered the following:

[42] First, Ms. Johnson came to Mr. Johnson's home equipped to deal with Mr. Johnson's will, bringing copies of her and her son's wills. She consulted a lawyer about a will for Mr. Johnson. On the day Mr. Johnson died, she told Mr. Davis a will had to be made now. She and Mr. Davis, together, at the kitchen table, prepared the documents for Mr. Johnson to sign. It is unlikely that a person with such an interest in Mr. Johnson's will would not read the documents he was signing.

[43] Second, Ms. Johnson says Mr. Davis brought the handwritten document to Mr. Johnson after the printed will form was signed; however, Mr. Belfield

says all the documents were together on the coffee table between Mr. Johnson and Mr. and Mrs. Belfield. I accept Mr. Belfield's evidence.

[44] Third, according to Mr. Belfield at the time the documents were witnessed, Ms. Johnson was sitting next to Mr. Johnson. I accept Mr. Belfield's evidence.

[45] Considering the evidence, including the foregoing, I find the words "see copy of will" and "my brother-in-law, William A. Davis" and the "✓" after the words "I nominate and appoint" in the handwritten document were present when the document was signed by Orland Johnson.

## KNOWLEDGE AND APPROVAL OF CONTENTS OF WILL

**[46]** In an application for proof in solemn proof, there is a burden on the propounder of the will to show knowledge and approval of the contents of the will. I have found that Orland Johnson at the time of signing the documents had testamentary capacity. The evidence of Mr. and Mrs. Belfield of Mr. Johnson's demeanour, his conversation and joking, and in the words of Mr. Belfield "Mr. Johnson wanted the will signed - was waiting for him to witness it" and Mrs. Belfield stating "Mr. Johnson wanted the will signed" would usually led to the presumption that Mr. Johnson had the required knowledge and approved of the contents of the will.

[47] However, in this case, Mr. Davis filled out the documents and is the main beneficiary of the will. The fact that the person who prepared the will is the main beneficiary is a matter to be considered by the Court. The test concerning such suspicious circumstances is set out by Ritchie, J. in **MacGregor v. Ryan** (1966), 53 D.L.R. (2d) 126 (S.C.C.) at p. 139:

> Counsel for the appellant contended that in all cases where the circumstances surrounding the preparation of execution of the will give rise to a suspicion, the burden lying on the proponents of that will to show that it was the testator's free act is unusually heavy one, but it would be a mistake, in my view, to treat all such cases as if they called for the meeting of some standard of proof of a more than ordinarily onerous character. The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case. It is true that there are expressions in some of the judgments to which I have referred which are capable of being construed as meaning that a particularly heavy burden lies upon the proponents in all such cases, but in my view nothing which has been said should be taken to have established the requirements of a higher degree of proof than that referred to by Sir John Nicholl in *Paske v. Ollat* (1815), 2 Phill. Ecc. 323 at p. 324, 161 E.R. 1158, where he said:

> . . . the law of England requires, in all instances of the sort, that the proof should be clear and decisive; the balance must not be left in equilibrio; the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper. In ordinary cases this is not necessary; *but where the person who prepares the instrument, and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person;* propriety and delicacy would infer that he should not conduct the transaction; . . . [The italics are my own.]

[48] Considering the evidence, including Mr. Johnson's condition and hearing the witnesses, I accept Mr. Davis' evidence that the will was read over to Mr. Johnson and Mr. Johnson had knowledge and approved of the contents of the two documents. Where there is a conflict between the evidence of Carolyn Johnson and William Davis, I accept the evidence of William Davis.

**REVOCATION**

[49] At the time Mr. Johnson signed the documents on August 4th, 2000, he signed two documents that on their face both are wills. Which document was signed first? Did the execution of the second document revoke the first?

[50] The evidence as to which document was executed first is not strong, but the witnesses who commented on the issue say the printed will form was signed before the handwritten document. I find the printed will form was signed before the handwritten document.

[51] The handwritten document contained a revocation clause. A revocation clause may be held under certain circumstances not to express the testator's intention. In **McCarthy and Cunliffe (Buller Estate) v. Fawcett and Buller, et al.**, [1944] 1 W.W.R. 228 (B.C.S.C.), Farris, C.J.S.C. stated at p. 234:

> ... From a careful examination of cases quoted *supra* by counsel for the plaintiffs and counsel for the defendant, it would appear to me that the following principles have been clearly laid down:
>
> (1) That a revocatory clause in a will may under particular circumstances be held not to be the intention of the testator and therefore ignored or eliminated in the granting of probate of the testamentary documents;

(2) That a man making a testamentary document and those who take after him are bound by his expressed intention and not by what he actually intends;

(3) That a mere mistake on the part of a testator in inserting a revocatory clause in a testamentary document is not sufficient in itself in the granting of probate to ignore or eliminate such revocatory clause;

(4) That where a testamentary document on its face is complete and contains a revocatory clause there is a heavy burden cast upon a plaintiff who comes into Court to say that the revocatory clause was not intended to be operative, and the submission of the plaintiff in such connection will only be given effect to on the most cogent evidence in support;

(5) That if evidence is admissible as to the circumstances under which the testamentary document containing the revocatory clause was made, such evidence must relate to or about the time such document was executed.

I think the words of Sir Gorell Barnes, P., in *Simpson v. Foxon* [1907] P. 54, at 57, 76 L.J.P. 7, are particularly helpful:

> "But what a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound, by his expressed intention. If that expressed intention is unfortunately different from what he really desires, so much the worse for those who wish the actual intention to prevail."

And again, the words of Langton, J. in *Lowthorpe-Lutwidge v. Lowthorpe-Lutwidge* [1935] P. 151, at 156, 104 L.J.P. 7l:

> "* * * I have looked at it again, and I think that it is a clear a statement as one could wish upon this matter. Sir Herbert Jenner said [in *Gladstone v. Tempest, supra*]: 'But it has been over and over again laid down that probate of a paper may be granted of a date prior to a will with a revocation clause provided the Court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit.' That is quite concisely stated and exactly what has been pressed upon the Court here, namely, that the Court should say it was not the intention of the testator to revoke the legacies and benefits contained in the earlier will of 1917 and the codicil of 1920. I think there is power to act in that way if the Court is satisfied that it was not the intention of the testator to so revoke. But the burden, in that case, is heavy. It is a heavy burden upon the plaintiff who comes into this Court to say: 'I agree that the testator was in every way fit to make a will, I agree that the will which he has

> made is perfectly clear and unambiguous in its terms, I agree that it contains a revocatory clause in simple words; nevertheless I say that he did not really intend to revoke the earlier bequests in earlier wills.' Quite obviously the burden must be heavy upon anybody who comes to assert a proposition of that kind."

Again at p. 157:

> "It really is a question in each case for the Court to decide: Is there evidence, and sufficient evidence, to establish that the testator did not intend to revoke? I do not think really the law is more complicated than that."

[52] Is there is sufficient evidence to meet the heavy burden on the propounders of the will as set out in principle (4) by Chief Justice Farris? In this case the documents were signed at the same time. They were, according to Mr. Belfield, together on the coffee table between Mr. Johnson and Mr. and Mrs. Belfield. I accept Mr. Belfield's evidence on this point as he is a disinterested person who did not embellish his evidence, but gave evidence of what he observed at the time the documents were executed.

[53] The handwritten document was only initialled by Mr. and Mrs. Belfield, again, consistent with the documents together forming one will. The handwritten document makes reference to the specific bequests and devises in the printed will form and did not name an executor, but had a "✓" where the name of the executor should be placed; again, consistent with the documents together forming one will. The two documents are not contradictory, they can stand together.

[54] Considering the specific facts of this case, I find the very heavy burden of proving the testator did not intend to revoke the printed will form has been satisfied. I therefore order that both the printed will form and the handwritten document be admitted to probate as the last will and testament of Orland E. Johnson, deleting from the handwritten document the revocation clause.

[55] I will hear counsel on the question of costs.

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**C. Richard Coughlan, J.**