S.C.A. Nos. 02661 and 02662

NOVA SCOTIA COURT OF APPEAL

Cite as: Carter v. Carter Estate, 1993 NSCA 26

Jones, Hallett, and Roscoe, JJ.A.

BETWEEN:

WAYNE CARTER and BRENTON CARTER Appellants	Melinda J. MacLean, Q.C. for Wayne Carter Dennis J. James for Brenton Carter
- and -	
LEROY WRIGHT, Executor of the Estate of the late WENDELL ARTHUR CARTER; SYLVIA CARTER and BEATRICE KENNEDY for Sylvia Carter and Respondents	John T. Rafferty for Leroy Wright Paul L. Walter and Jane Holmes Beatrice Kennedy
	Appeal Heard: February 8, 1993
	Judgment Delivered: February 11, 1993

THE COURT: Appeal dismissed with costs to the respondents fixed at $1,000.00 each for a total of $2,000.00, plus reasonable disbursements; the executor to have the difference between $1,000.00 plus disbursements and his solicitor-client costs as taxed paid out of the estate, per reasons for judgment of Roscoe, J.A.; Jones and Hallett, JJ.A. concurring.

ROSCOE, J.A.:

This is an appeal from a decision of Davison J. interpreting the will of the late Wendell Arthur Carter. The testator was never married and had no children. Four sisters and one brother survived him. One sister and two brothers predeceased him. One of them, Thomas, died a few weeks before the testator.

The appellants are the surviving brother, Brenton Carter, and Wayne Carter, who is the son of Thomas.

The trial judge was asked on application of the executor to interpret clauses 4, 6, 9 and 10 of the will. The relevant portions of the will are as follows:

> "4. I GIVE, DEVISE AND BEQUEATH my home and farm property situate at Brookfield, aforesaid, together with the contents thereof, to my sister, SYLVIA CARTER, for her own use absolutely.
>
> 5. I GIVE, DEVISE AND BEQUEATH the house and one-half acre lot situate at Pleasant Valley, in the County of Colchester and Province of Nova Scotia, presently occupied by my sister, Beatrice Kennedy, to my said sister, BEATRICE KENNEDY, for her own use absolutely.
>
> 6. I GIVE, DEVISE AND BEQUEATH my woodlot, acquired from Mrs. Evans, to my brother, THOMAS CARTER, for his own use absolutely.
>
> 7. I GIVE, DEVISE AND BEQUEATH my late father's woodlot, acquired from Mrs. Adam Archibald, to my brother, BRENTON CARTER, for his own use absolutely.
>
> 8. I GIVE, DEVISE AND BEQUEATH any money I may have in a bank account or any investments of whatsoever nature equally to my sisters, JESSIE WRIGHT, BEATRICE KENNEDY and NORMA COLLINS.
>
> 9. I GIVE, DEVISE AND BEQUEATH the entire residue of my estate equally to my brothers.
>
> 10. IN THE EVENT that any beneficiary under this my Will shall have predeceased me, then the gift to which he or she

> would have been entitled shall be divided equally among the survivors of my brothers and sisters."

In his decision, the trial judge, after reviewing the evidence, resolving conflicts in the evidence, and referring to the applicable law, found that the words "my home and farm property" in clause 4 included all the land owned by the testator at his death except those lands specifically devised.

The trial judge interpreted the words "survivors of my brothers and sisters" in clause 10 to mean the brothers and sisters of the testator alive at his death; that is the only reasonable interpretation of that clause.

He found that the effect of clause 10 on clause 6 was that the woodlot devised to Thomas Carter devolved to the brothers and sisters of the testator alive at his death.

With respect to clause 9, the trial judge found that clause 9 was a class gift and therefore clause 10 did not affect it, which meant that Brenton Carter was entitled to the residue.

On the matter of costs, the trial judge allowed the executor his costs to be paid by the estate on a solicitor-client basis but ordered all other parties to bear their own costs. His reasons for exercising his discretion in that manner were that the position of the appellants was not logically credible, and that to order costs paid by the estate would result in beneficiaries who were not involved in the litigation paying the costs of those who were. He was also influenced by the fact that the successful parties, Sylvia Carter and Beatrice Kennedy, were prepared to pay their own costs, rather than burden the estate.

The appellants submit that the trial judge erred by failing to apply the proper principles of construction in interpreting the will, by failing to admit evidence of surrounding circumstances, by failing to give effect to the whole will, by failing to hear direct evidence of the testator's intention and by failing to award costs to the parties on the application.

We have carefully reviewed the record and the submissions of counsel and conclude that the issues before us are largely questions of fact.

The findings of fact made by the trial judge significantly affected his application of the law of interpretation of wills; for example, his findings that the testator purchased the Evans property for the dual purpose of assisting his sister and of expanding the farmlands, that he had a special relationship with Sylvia, and that the Evans and Carter lands were farmed as a unit.

Unless there is a serious and overriding error this Court will not interfere with the factual findings. The record reveals that there was adequate evidence upon which the trial judge could make the findings of fact he did.

As to the contention that the trial judge erred in not allowing direct evidence of the testator's intention, we find that this was not one of the limited circumstances where that type of evidence is admissible. There were not two things equally answering the description in clause 4. (See S.J. Bailey, The Law of Wills, 7th edition, pp. 217-218 and Thomas G. Feeney, The Canadian Law of Wills, Vol. 2, 3rd edition, pp. 66-69.)

With respect to the interpretation given by the trial judge to clause 10 and its effect on clause 6, we agree with his application of law, his interpretation, and the result. His interpretation of its effect on clause 9 has not been challenged on the appeal.

On the matter of costs on the trial, we agree that in the circumstances of this case, the trial judge properly exercised his discretion.

The appeal is therefore dismissed. The respondents shall have their party and party costs against the appellants. We fix those costs at $1,000.00 each for a total of $2,000.00 plus reasonable disbursements. In addition, the executor shall have the difference between $1,000.00 plus disbursements and his solicitor-client basis costs as taxed paid out of the estate.

J.A.

Concurred in:

Jones, J.A.

Hallett, J.A.