C.A. No. 02822

NOVA SCOTIA COURT OF APPEAL

Cite as: MacKinlay v. MacKinlay Estate, 1993 NSCA 115

Jones, Hallett and Freeman, JJ.A.

**BETWEEN:**

| | | |
|---|---|---|
| LULU ELLEN MACKINLAY | ) | Ronald W. Burton |
| | ) | for the Appellant |
| Appellant | ) | |
| | ) | |
| - and - | ) | |
| | ) | David Green |
| | ) | for the Respondent |
| THE ESTATE OF HUGH PALMER MACKINLAY | ) | |
| | ) | |
| Respondent | ) | Appeal Heard: |
| | ) | June 11, 1993 |
| | ) | |
| | ) | |
| | ) | Judgment Delivered: |
| | ) | July 8, 1993 |
| | ) | |

**THE COURT:** Appeal allowed and the decision of the trial judge set aside per reasons for judgment of Jones, J.A.; Hallett and Freeman, JJ.A. concurring.

JONES, J.A.:

The issue on this appeal is whether a codicil executed by the testator revived his will which was revoked by his marriage.

The case was tried by Justice Bateman, as Judge of Probate, on an agreed statement of facts. The deceased, Hugh Palmer MacKinlay, died on April 14, 1992.

His will was signed on December 8, 1989. The will, in addition to certain specific bequests, provided for a division of the residue among the testator's four children. A first codicil was executed on March 26, 1992. The codicil substituted Lulu Borden, the testator's common-law wife, as executrix. In addition it included Ms. Borden equally in the division of the residue. On April 3, 1992, the testator married Ms. Borden thereby revoking the will and codicil by operation of s. 17 of the **Wills Act**, R.S.N.S., 1989, c. 505. On April 4, 1992, the testator made a second codicil. The codicil disposed of his three vehicles to his two sons and "my wife Lulu", individually. It provided a cash bequest to his daughter, Carrie. The vehicles had not been specifically bequeathed in the prior instruments. The second codicil was handwritten by Ms. Borden. The opening paragraph provides:

> "This is the second codicil to the last will and testament of me, Hugh Palmer MacKinlay of Bedford in the County of halifax, Province of Nova Scotia, which last will and testament is dated December 8, 1989."

There is no other reference in the second codicil to the will.

The learned trial judge found that the second codicil revived the will and the first codicil. The appellant, the widow, has appealed from that decision. There are numerous grounds of appeal in the notice. However, the issues are set out in the appellant's factum as follows:

> "1. Does the codicil dated the 4th day of April 1992 revive the will dated the 8th day of December 1989 and the first codicil dated the 26th day of March 1992.
>
> 2. Should the Court require that external evidence be admitted.
>
> 3. Does Public Policy require that the Court not revive a will revoked by marriage.
>
> 4. Costs."

With respect to the second issue the appellant requested that evidence be adduced

as to the circumstances surrounding the execution of the will and codicils. The main thrust of the evidence is to show the testator did not know that the marriage revoked his will. The proposed evidence was available at the time of trial and cannot be described as new or fresh evidence. The only reasonable inference from the documents is that the testator was not aware of the effect of s. 17 of the **Wills Act**. Under s. 21 of the **Act** the intention of the testator must be found in the codicil. In any event after hearing counsel we are satisfied that the parties had an agreement to proceed on an agreed statement of facts and that no evidence would be called unless the trial judge could not make decision on the documents. The trial judge stated in her decision:

> "I find no ambiguity. In such circumstances I am satisfied that it is not necessary or appropriate to hear extrinsic evidence of intention as gathered from the circumstances surrounding the execution of the codicil."

The parties are bound by the agreement and accordingly the applications to adduce evidence is dismissed.

On the main issue, essentially, the appellant contends that the second codicil did not show an intention to revive the will as required by s. 21 of the **Wills Act**.

Sections 19 and 21 of the **Wills Act** provide as follows:

> "19 No will or any part thereof is revoked otherwise than by
>
> (a) marriage as hereinbefore provided;
>
> (b) another will executed in manner by this Act required;
>
> (c) some writing declaring an intention to revoke the same and executed in the manner in which a will is by this Act required to be executed; or
>
> (d) the burning, tearing or otherwise

> destroying the same by the testator, or by some person in the testator's presence and by the testator's direction, with the intention of revoking the same.
>
> 21 No will or any part thereof which has been in any manner revoked is revived otherwise than by the re-execution thereof, or by a codicil executed in manner in this Act required, and showing an intention to revive the same and, when any will which has been partly revoked and afterwards wholly revoked is revived, such revival does not extend to so much thereof as was revoked before the revocation of the whole thereof unless an intention to the contrary is shown."

In referring to s. 19 the learned trial judge stated:

> "What is unclear is whether 'intention to revive' means the testator's intention that the prior Will continue to operate or a specific intention to revive. The latter requires knowledge that the will has been revoked while the former does not. It would seem reasonable that some distinction be made, in terms of the clarity of intention required, between the situation in which the testator has clearly and consciously taken the step to revoke his will (in which event he will most certainly know of its revocation) and that where the will has been revoked by operation of law. In this latter circumstance the testator may or may not be aware of the status of the will. Where the testator has actively revoked his will, the statement of intention to revive must be explicit to ensure that the testator's intention is given effect. 'Intention to revive' must be determined in the context of the objective circumstances, in this case, a revocation by operation of law. In my view, therefore, unlike the situation in many of the cases considering revival, there is not, here, the clear prior intention to revoke."

She distinguished the cases of **In The Goods of Steele** (1968), 1 P & D 575 and **MacDonnell v. Purcell** (1894), 23 S.C.R. 101 and followed the decision of Willmer, J., **In the Estate of Davis**, [1952] 1 All E.R. 509. She concluded by stating:

> "The fact of Mr. MacKinlay drawing the second codicil must itself be treated as some evidence of

> intention. Mr. MacKinlay refers to the final instrument as 'the second codicil to' my last will and testament 'dated Dec.8, 1989', there being only one prior Will. He refers to Ms. Borden as 'my wife Lulu' as distinct from his reference to her in the first codicil as 'Lulu (Betty) Ellen Borden'. He makes only limited bequests and those not inconsistent with his will as altered by the first codicil. The only possible intention I can infer is that Mr. MacKinlay intended that his prior Will continue to govern the disposition of his property. This is consistent, as well, with the presumption against intestacy."

The appellant argues the trial judge erred in holding that the mere making of the codicil which referred to the will was sufficient to revive the will. I agree with that submission. Section 21 of the **Act** is clear. The codicil must show an "intention to revive". It is not sufficient to show that the testator believed that his will was valid. Section 21 applies to any will revoked in accordance with s. 19 of the **Act**. With respect there is no distinction under s. 21 as to the necessary intention to revive depending on how the will is revoked. The testator is presumed to know the law. In making that distinction the learned trial judge erred.

The only inference that can be drawn from the second codicil is that the testator thought that the will was still valid. There is no language in the codicil that he intended to revive the will or even that it would continue. In my view the language used in sections 17 and 21 of the **Wills Act** is clear. The provisions are for the benefit of the widow. It is the duty of the Court to carry out the clear intention of the legislature.

The views which I have expressed are in accord with the authorities. **In the Goods of Steele** (1) Law Rep. 1 P. & D. 575 Sir J. P. Wilde in interpreting the comparable provision in the English Statute stated at p. 578:

> ""I therefore infer that the legislature meant that the intention of which it speaks should appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive

> the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expressions conveying to the mind of the Court, with reasonable certainty, the existence of the intention in question. In other words, I conceive that it was designed by the statute to do away with the revival of wills by mere implication."

That case has been continuously followed as setting out the correct statement of the law. In **McLeod v. McNab**, [1891] P.C. 471 Lord Hannen in delivering the judgment of the Privy Council stated at p. 474:

> ""Now the language of the statute which regulates these matters in the Colony as well as in this country, so far as it is necessary in this case to state it, is this: 'No will or codicil shall be revived otherwise than by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same.' It has been decided in many cases that the intention must be found in the instrument itself; and it may be taken that the recent decisions have established that a mere reference to the document intended to be dealt with, whether will or codicil, by its date, is not sufficient in itself. The date is an important element in the consideration, but it is not to be taken by itself; it becomes necessary to look to the context and to anything else in the document which may explain whether the intention of the testator was to confine the action of the testamentary disposition under consideration to the document of that date, or to extend it to something more."

In **MacDonell v. Purcell** (1894), 23 S.C.R. p. 101, Sedgewick J. stated at p. 120:

> "The object of the statute was to do away with the revival of wills by mere implication, and to make it clear that in the codicil itself there must be some unequivocal expression of an intent on the testator's part to restore to life the revoked instrument.
>
> It has been decided, over and over again, that a reference in a codicil to a revoked will, by its date only, is not of itself a sufficient indication of an intent to revive that will, and these decisions have been in effect, approved of by the Privy Council in **McLeod v. McNab**".

The following passage is from Halsbury's Laws of England, 3rd ed. at par. 1371:

> "Where a will which has been revoked is re-executed, the fact of re-execution shows that the testator intends to revive it. Where it is revived by codicil, the statutory requirement that there must be an intention to revive it must be satisfied. For this purpose the intention must appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive it, or by a disposition of the testator's property inconsistent with any other intention, or by some other expressions showing, with reasonable certainty, the existence of the intention . Although extrinsic evidence of the testator's intention is excluded, the court ought always to receive such evidence of the surrounding circumstances as, by placing it in the position of the testator, will better enable it to read the true sense of the words he has used."

Professor Feeney, in his text, The Canadian Law of Wills, Vol 1: Probate (3rd ed.) states at p. 158:

> "For the purpose of reviving a revoked will no particular form of words is needed; it is not necessary that the reviving instrument be annexed to the revoked will but simply to physically annex a codicil to a revoked will does not revive it. There must be found in the codicil itself words which can be construed as 'showing an intention to revive' within the section of the Act. A mere statement that a codicil is a codicil to a revoked will is not sufficient to revive it, nor does a mere reference by recital in the codicil to a revoked will by its date revive it. The problem that usually confronts a Court of Probate, asked to decide whether a revoked will is revived or not, is often a difficult one of construction to determine that the codicil shows the necessary 'intention to revive'. It seems that the codicil must make some clear allusion to at least one of the provisions of the revoked will in order for it to be said that the codicil shows a sufficient intention to revive. However, if the codicil expressly uses the word 'confirm' with reference to the revoked will, although it makes no reference to any of its provisions, it is felt that, despite some English authority to the contrary, the court should declare a revival. The court must be satisfied, however, that it was the testator's true intention to revive the will and that he has made no mistake in saying that he

> 'confirms' his will. Although no external evidence of a direct nature is admissible to construe the testator's intention, evidence of the surrounding circumstances or indirect evidence of intention is admissible, just as it is to construe the question of an intention to revoke the subsequent document or, indeed, any question of the testator's intention with regard to his will."

The trial judge relied on **In the Estate of Davis**, [1952] 2 All E.R. 509. In that case the testator made a will on October 2, 1931, in which he purported to devise and bequeath all his property to Ethel Horsley whom he appointed his sole executrix. On October 22, 1932, the testator married Ms. Horsley. On May 29, 1943, the testator executed a codicil on the outside of the envelope containing the original will and all it said was "The herein named Ethel Phoebe Horsley is now my lawful wedded wife". It was duly executed. Willmer, J. referred to **In the Goods of Steele** and stated:

> "The question remains whether it can be said that there is some impression conveying to the mind of the court with reasonable certainty the existence of an intention to revive the will".

On the reviewing the facts he concluded that there was no other intention in signing the codicil except to revive the will. The codicil confirmed the will. That is not the situation in the present case. One cannot conclude from the evidence that the codicil shows with reasonable certainty an intention to revive the will. In the result I would allow the appeal and set aside the decision of the trial judge. The will and first codicil were revoked by the testator's marriage. The second codicil is valid and should be admitted to probate.

The parties are entitled to their costs both on the trial and the appeal to be taxed on a solicitor and client basis and to be paid from the estate.

J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.

**BETWEEN**:

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|---|---|---|
| LULU ELLEN MACKINLAY | ) | |
| Appellant | ) | |
| - and - | ) | R E A S O N S |
| FOR | ) | JUDGMENT |
| BY: | | |
| The Estate of Hugh Palmer MacKinlay | ) | |
| | ) | JONES, |
| | ) | J.A. |
| Respondent | ) | |
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