SUPREME COURT OF NOVA SCOTIA
Citation: ***Hayward Estate (Re)***, 2010 NSSC 6

Date: 20100607
Docket: Probate No. 3492
Dig-308922
Registry: Digby

In the Estate of George Michael Hayward

Application to Revoke the Grant of Administration
Issued to Michael Philip Hayward
s. 64(3)(a)

Judge:	The Honourable Justice Allan P. Boudreau
Heard:	June 24, 2009, in Digby, Nova Scotia; last written submissions received January 28, 2010.
Counsel:	Gregory Barro, for the applicant, Nancy Vera Hayward Eric Sturk, for the respondent, Michael Philip Hayward

Introduction

[1] This case involves the not uncommon situation of a divorcing party not changing his or her will (which will names the other party as the primary beneficiary) when the divorce is finalized. One of the former spouses then dies and the surviving former spouse claims the estate on the basis of the deceased's will, which, in many cases, was executed years prior to the divorce. At issue are recent amendments to the *Wills Act*, R. S. 1989, c. 505, s. 1 (*Wills Act*), which addressed this situation, as well as waivers and renunciations contained in the separation and divorce documents.

Background

[2] George Michael Hayward (George Hayward) and Nancy Vera Hayward (Nancy Hayward) were married on December 6, 1984. They have one child, a son, Michael Philip Hayward (Michael Hayward), born May 30, 1983.

[3] George Hayward executed a Last Will and Testament on February 10, 1995 (the Will). That Will appointed his then wife, Nancy Hayward, as sole executor and beneficiary of his estate. The Will further provided that if Nancy Hayward did not survive George Hayward for thirty (30) days, then the beneficiary of the estate would be their son, Michael Hayward.

[4] George and Nancy Hayward were separated twice during their marriage. The first time was in 1989, which resulted in a formal separation agreement dated November 1, 1989; however, they reconciled in 1991. The Haywards separated again in September of 2002 and executed a second separation agreement dated June 28, 2004. The June 28, 2004, agreement contained many statements regarding property interests and rights. Some of these agreements are outright waivers and renunciations of interests or claims; whereas, others are promises from one party to the other, which I shall refer to later.

[5] The parties did not reconcile after the 2004 separation and final Divorce and Corollary Relief Judgments were obtained on September 21, 2004. The Corollary Relief Judgment of September 21, 2004 incorporated by reference the June 28,

2004, separation agreement and all of its settlement terms. The separation agreement is a very detailed document, including the financial consideration for the division of property between the spouses. I will refer to those arrangements in more detail later.

[6] George Hayward did not address the issue of his Will directly at the time of the divorce, by either revoking his Will, or by making a new Will. This was apparently not an uncommon occurrence and the Law Reform Commission had been asked to study the situation and make recommendations to the Legislature for possible amendments to the *Wills Act*. The result was Section 19A, which was added to the Wills Act by Bill No. 23, which received Royal Assent November 23, 2006. Section 19A was proclaimed in force effective August 19, 2008. That Section effectively provided that a judgement absolute of divorce nullifies any bequests contained in a prior Will of divorced parties. I shall set out this Section in more detail later.

[7] George Hayward passed away on October 15, 2008, some two months after Section 19A was proclaimed in force. He had not directly addressed the issue of his 1995 Will by change or revocation. The Haywards' son, Michael, applied for and was granted administration of his late father's estate by virtue of George Hayward's 1995 Will and the divorce documents. Nancy Hayward has made application to have Michael Hayward removed and herself appointed as sole executor and declared sole beneficiary of her former husband's estate on the basis of the same 1995 Will.

Issues

1. What are the events which trigger the application of Section 19A of the *Wills Act*?

2. What is the effect of Section 19A of the *Wills Act*, if any, upon the 1995 Will of George Hayward?

3. If Section 19A of the *Wills Act*, has no application to the Haywards' situation, then are there provisions in the separation and divorce documents which bar Nancy Hayward from acting as executor and benefiting from the estate?

4. Are there any equitable principles which estop Nancy Hayward from now asserting her claim to George Hayward's estate?

ANALYSIS

Jurisdiction

[8] The court's jurisdiction to deal with the main issue is set out in s. 8(1)(c) of the *Probate Act*, S.N.S. 2000, c. 31, which permits the court to "effect and carry out the judicial administration of the estates of deceased persons through their personal representatives, and hear and determine all questions, matters and things in relation thereto necessary for such administration."

The Wills Act

[9] Section 19A of the *Wills Act* came into force on August 19, 2008. It provides:

> **Effect of divorce or declaration of nullity**
>
> 19A Notwithstanding Sections 18 and 19, except where a contrary intention appears by the will or a separation agreement or marriage contract, where, after the testator makes a will, the testator's marriage is terminated by a judgment absolute of divorce or is declared a nullity,
>
> (a) a devise or bequest of a beneficial interest in property to the testator's former spouse;
>
> (b) an appointment of the testator's former spouse as executor or trustee; and
>
> (c) the conferring of a general or special power of appointment on the testator's former spouse,
>
> are revoked and the will shall be construed as if the former spouse had predeceased the testator. [Emphasis added]

[10] The amendment was included in S.N.S. 2006, c. 49, s.6, which included various amendments to the *Wills Act*. Section 19A came into force after the Will

was made and after the testator's divorce (2004), but before his death (October 2008). As such, both of the events identified in section 19A – the making of the Will and the termination of the marriage by divorce – occurred before the section came into force.

[11] Also relevant to the operation and construction of a will are Sections 22 and 23 of the *Wills Act*, which provide:

> **Effect of conveyance or other act**
>
> 22 No conveyance or other act made or done subsequently to the execution of a will of any real or personal property therein comprised, except an act by which such will is revoked as in this Act mentioned, prevents the operation of the will with respect to such estate or interest in such real or personal property as the testator has power to dispose of by will at the time of the testator's death.
>
> **Time of which will speaks**
>
> 23 Every will shall be construed, with reference to the real and personal property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.
> [Emphasis added]

[12] The *Wills Act* does not define "testator," other than to specify, at s. 2(e), that the term "includes a married woman."

Retrospectivity

[13] Certain general rules under the *Interpretation Act*, S.N.S. 2006, c.49, s.7 govern the entry of a provision into effect. In this case, the *Wills Act* amending statute was declared to come "into force on such day as the Governor in Council orders and declares by proclamation." Section 3(3) of the *Interpretation Act* provides that [w]here an enactment is expressed to come into force on a particular day or on a day fixed by proclamation or otherwise, it comes into force immediately on the expiration of the previous day... ." Additionally, the *Act* provides (at s. 9(1)) that "[t]he law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and

every part thereof, according to its spirit, true intent, and meaning." It is, of course, well known that, as provided by s. 9(5),

> (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[14] Substantive legislation is presumed not to operate retroactively or retrospectively. The definitions of the terms "retroactivity" and "retrospectivity" are discussed in **Re Thibault Estate**, 2009 NSSC 4, [2009] N.S.J. No. 10 (Prob. Ct.), where Duncan, J., at ¶ 9, adopted the following passage from the British Columbia Court of Appeal decision in **MacKenzie v British Columbia (Commissioner of Teachers' Pensions)** (1992), 15 B.C.A.C. 69:

> I begin by adopting both the language and the analysis of Professor Driedger in Statutes: Retroactive Retrospective Reflections (1978), 56 Can. Bar Rev. 264, and in particular his conclusions which are summarized at p. 276 of that article:
>
> 1. A retroactive statute is one that changes the law as of a time prior to its enactment.
>
> 2. (1) A retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment.
>
> 3. A statute is not retrospective by reason only that it adversely affects an antecedently acquired right.

> 4. A statute is not retrospective unless the description of the prior event is the fact-situation that brings about the operation of the statute.
>
> 5. The presumption does not apply unless the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty.
>
> 6. The presumption does not apply if the new prejudicial consequences are intended as protection for the public rather than as punishment for a prior event.

[15] The question here is whether s. 19A of the *Wills Act* was intended by the Legislature to have retrospective effect, or whether its application to the present circumstances can be considered to be prospective, as Nancy Hayward argues. The retrospective effect would be the attachment of a new consequence – the termination of Nancy Hayward's entitlement under the Will – to a prior event, namely, the divorce of Nancy Hayward and the testator.

[16] The Supreme Court of Canada considered the retrospective operation of statutes in **Gustavson Drilling (1964) Ltd. v. M.N.R.**, [1977] 1 S.C.R. 271, where Dickson J., for the majority, said at p. 279:

> . . . The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively . . . .

[17] In **Québec (A.G.) v. Healy**, [1987] 1 S.C.R. 158, the Court said at ¶ 24-28:

> In *Maxwell on the Interpretation of Statutes* (12th ed. 1969), it is stated at p. 215:
>
> > Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. . . .

And at p. 216:

> One of the most well-known statements of the rule regarding retrospectivity is contained in this passage from the judgment of *R. S. Wright in Re Athlumney*, [1898] 2 Q.B. 551, at pp. 551, 552: "Perhaps no rule of construction is more firmly established than this -- that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only".

And further at p. 216:

> If, however, the language or the dominant intention of the enactment so demands, the Act must be construed so as to have a retrospective operation, for "the rule against the retrospective effect of statutes is not a rigid or inflexible rule but is one to be applied always in the light of the language of the statute and the subject-matter with which the statute is dealing." (*Carson v. Carson* [1964] 1 W.L.R. 511, per Scarman J. at p. 517.)

In *Acme Village School District (Board of Trustees of) v. Steele-Smith*, [1933] S.C.R. 47, Lamont J. writes at p. 50:

> If, however, any doubt as to the legislative intention exists after a perusal of the language of the Act, then, as Lord Hatherly [sic], L.C., said in Pardo v. Bingham (1869), 4 Ch. App. 735, at 740:
>
> > We must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated.

In *Upper Canada College v. Smith* (1920), 61 S.C.R. 413, Duff J., as he then was, wrote at p. 419 regarding the intent of the legislator:

> . . . that intention may be manifested by express language or may be ascertained from the necessary implications of the provisions of the statute, or the subject matter of the legislation or the

> circumstances in which it was passed may be of such a character as in themselves to rebut the presumption that it is intended only to be prospective in its operation.

[18] Michael Hayward contends that to apply s. 19A in the present case would be a prospective application of the statute and not a retrospective one, because the Will would not take effect until the testator's death. While that may be so, the two events, the making of the Will and the divorce, both occurred prior to the enactment of s. 19A.

Vested Rights

[19] As to the companion doctrine respecting non-interference with vested rights, Dickson, J. said, in **Gustavson Drilling** at p. 282:

> . . . The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board* [[1933] S.C.R. 629], at p. 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights.... No one has a vested right to continuance of the law as it stood in the past. ...

[20] In **Nova Scotia (Workers' Compensation Board) v. Muise** (1998), 170 N.S.R. (2d) 253, [1998] N.S.J. No. 182 (C.A.), Bateman, J. A., at ¶ 32, cited *Sullivan and Driedger's Construction of Statutes*, on vested rights:

> In Driedger on the **Construction of Statutes**, Third Edition, 1994, the author, Ruth Sullivan, wrote at p. 539:
>
> > The presumption against interfering with vested rights is rebutted by any adequate indication that the legislature intended its legislation to have immediate and general application despite its prejudicial impact. This intention is sometimes stated expressly in the form of transitional provisions. These set out rules specifying the temporal application of the legislation being repealed or

> enacted by a particular **Act**. Such rules prevail over any contrary common law or **Interpretation Acts**.

[21] Michael Hayward says that Nancy Hayward had no vested right under the Will when s. 19A came into force. There was nothing to prevent the testator from making a new Will. This appears to be correct; however, Nancy Hayward is not claiming a vested right.

Wills Act Caselaw

[22] A provision similar to s. 19A of the Nova Scotia *Wills Act* was considered in **Re Matejka Estate** [1984] B.C.J. No. 1645. Subsection 16(1) of the *British Columbia Wills Act* provided:

> 16.(1) Where in a will a testator
>
> (a) gives an interest in property to his spouse;
>
> . . .
>
> and after the making of the will and before his death . . .
>
> (e) his marriage is terminated by a decree absolute of divorce;
>
> . . .
>
> then, unless a contrary intention appears in the will, the gift . . . is revoked and the will takes effect as if the spouse had predeceased the testator . . .

[23] In **Matejka Estate**, the deceased made his Will and was divorced from his wife before s. 16(1) came into force but he died after it came into force. MacFarlane, J.A., for the court, said at ¶ 9:

> In my opinion s. 16 cannot apply to revoke the gift to the spouse of the testator unless the section is given a retroactive or retrospective effect. It is true that s. 16 is directed at the effect to be given to a Will when death occurs after s. 16 comes into force, but the result must be determined by the happening of a past event. I agree with Chief Justice McEachern that the event bringing about a revocation of the gift to the spouse is the Decree Absolute of Divorce, which occurred before the legislation came into force. If the law in force at the date of the Decree

> Absolute was applied it would not result in revocation. If the section is now to have that effect then it must be operating retroactively or retrospectively. [Emphasis added]

[24] The court concluded that no vested rights were affected, and that the question was whether the section could be given retrospective effect, given that its effect was to attach a different consequence to a divorce. MacFarlane, J.A. at ¶ 15:

> Section 16 does not, in my opinion, clearly provide for a retrospective application, nor does such a construction arise by necessary and distinct implication. Section 16 does not speak of a marriage which has been terminated but of when the testator's "marriage is terminated". If the legislation had been intended to be retrospective in its application, or had been intended to be read as the appellant submits then it would have provided "where in a Will a testator has given an interest in property to his spouse, and after the making of the Will and before his death his marriage has been terminated by a Decree Absolute of Divorce then, unless a contrary intention appears in the Will, the gift shall be treated as having been revoked, and the Will shall have the effect as if the spouse had predeceased the testator." I see no reason in this case to read the statute as if it had contained such language. A plain reading of the section forecasts the making of a Will, the giving of an interest to a spouse, a divorce, and a death. . . . [Emphasis added]

[25] Section 19A of the Nova Scotia *Act* uses language similar to that in the British Columbia *Act*: “where, after the testator makes a Will, the testator's marriage is terminated” the gift or appointment granted to the spouse in the Will “are revoked and the will shall be construed as if the former spouse had predeceased the testator.” This language is entirely forward-looking.

[26] MacFarlane, J.A. went on to consider the consequences of a retrospective reading of s. 16 of the British Columbia *Act* at ¶ 16-17:

> If s. 16 were to be applied in this case it would attach a new duty, penalty, or disability -- a prejudicial consequence -- to a prior event. Clearly it would have a prejudicial effect upon the respondent, whom, it appears, had been divorced without obtaining a proper division of family assets. Prior to the enactment of s. 16 the common law applied, and she would not have lost her rights under the Will of her former husband upon being divorced from him, without some step on his part, such as remarriage or the execution of a new Will. I am unable to construe the legislation as intending to create such a prejudicial consequence. I think that the presumption against retrospectivity applies.

> Although I agree with counsel for the appellant that s. 16 is remedial legislation and ought to be given such fair, large and liberal construction and interpretation as best assures the attainment of its objects, I am not persuaded that the legislation was intended to apply to attach a new consequence for the future to a Decree Absolute of Divorce, granted before the statute was passed. [Emphasis Added]

[27] In **Page Estate v. Sachs**, [1993] O.J. No. 269, the Ontario Court of Appeal considered the effect of certain provisions of the *Succession Law Reform Act*, which provided, at ss. 17(2):

> Except when a contrary intention appears by the will, where, after the testator makes a will, his or her marriage is terminated by a judgment absolute of divorce or is declared a nullity,
>
> > (a) a devise or bequest of a beneficial interest in property to his or her former spouse;
> >
> > (b) an appointment of his or her former spouse as executor or trustee; and
> >
> > (c) the conferring of a general or special power of appointment on his or her former spouse,
>
> are revoked and the will shall be construed as if the former spouse had predeceased the testator.

[28] As with the Nova Scotia and British Columbia *Acts*, the language of s. 17(2) of the Ontario legislation is forward-looking. However, the Ontario *Act* also included the following direction, at s. 43:

> This Part applies to wills made before, on or after the 31st day of March, 1978 where the testator has not died before that date.

[29] In **Page Estate**, as in the present case, the testator's will had been made, and the divorce concluded, before the provisions came into force; but they were in force by the time the testator died. Blair, J.A., for the court, at ¶ 6, characterized s. 17(2) as "a classic example of retrospective legislation which alters the legal effect of a previous *Act*, the making of a will, after it has occurred." He added at ¶ 9:

> Read literally, s. 17(2) refers to a specific time in the past after a testator has made a will when the marriage is terminated. At that time, the Act declares that all testamentary dispositions to a spouse are revoked and that the will should be interpreted as if the spouse had predeceased the testator. It is, in my opinion, grammatically correct for the statute to employ the present tense in these circumstances to describe the legal effect of past events, namely, the termination of the marriage and the revocation of testamentary dispositions to a spouse.

[30] This is a different interpretation of the present tense language of such provisions than that found in **Matejka** and **Re Thibault Estate**. Blair, J.A. went on to consider s. 43 at ¶ 10:

> The effect of s. 43, which applies to wills made before, on or after March 31, 1978, is to attach new and prejudicial consequences from the standpoint of a spouse to a will made at a time in the past before a marriage is terminated. A literal construction of the Act makes the conclusion indisputable that, in this case, the testator's will, made before divorce, must be construed as if the appellant spouse had predeceased him.

[31] Blair, J.A. departed from the reasoning of **Matejka Estate** at ¶ 13:

> I am of the respectful opinion that, for the reasons given above, the reference in s. 17(2) of the Act to the termination of the marriage in the present tense is not inconsistent with its retrospective operation. Nor is the result different because the Act does not state that it applies retrospectively to divorce decrees obtained before the Act came into force, in the same way it applies to wills made before that date. Such a statutory instruction is not necessary because the Act is legislation with respect to wills and not with respect to divorce. It purports only to govern the interpretation of wills after a marriage is terminated and does not purport to affect the status of divorce decrees.

[32] The result was that ss. 17(2) and 43, read together, demonstrated the legislature's intention that s. 17(2) should operate retrospectively. The court also found support for a retrospective reading in the legislative history of the provisions, particularly a report of the Ontario law Reform Commission, as referred to by Blair, J.A. at ¶17:

> The report discussed various methods of accomplishing the required change in the law and recommended that, where a testator is divorced after making a will leaving property to a spouse, the will should be read as if the former spouse had died before the testator, unless the will expressly provides otherwise. The report

> added a caution, at p. 10, pertinent to this case, against postponing effective reform:
>
> > *Since it may well be presumed, in the absence of clear evidence to the contrary, that legislation is intended for prospective operation only, the amending statute should contain an express provision clarifying the legislative intention on this point*. To make the legislation prospective only would be, in effect, to postpone reform for a generation or more, and there are no justifiable grounds for so doing. [Emphasis by Blair, J.A.]

And further at ¶ 18:

> The italicized passage appears to provide the conceptual basis of s. 43 of the Act which, in my view, makes the application of s. 17(2) retrospective and not merely prospective....

[33] There appears to be some uncertainty in **Page Estate** as to whether the language of s. 17(2) alone was sufficient to support a retrospective reading, or whether (as the last passage suggests) s. 43 of the Ontario legislation gave it that effect.

[34] In **Re Thibault Estate**, supra, Duncan, J. considered an application by the testator's former wife to determine whether section 19A operated retroactively or retrospectively. The husband's will – made in 1999 – named the wife executrix and sole beneficiary of his estate. It was never varied or revoked. The parties divorced in 2003 and the husband died in 2008. As such, the Will was made and the parties divorced before section 19A came into force, but the husband died shortly after it came into force, as in the present case. Duncan, J. held that section 19A should be read prospectively. He noted that the *Wills Act* did not indicate that the section operated retroactively. After considering various extrinsic sources – including the report of the Law Reform Commission and references in **Hansard** – Duncan, J. said at ¶ 17:

> I do not find a sense of urgency in the comments of either of these bodies, nor identification of a societal problem so pressing that the amendment needs to be enforced retrospectively. In some past instances unintended benefits passed to former spouses as a result of the failure of a party to amend their will after divorce, or to otherwise address the consequences of the divorce on his/her estate. The "mischief" sought to be remedied by the amendment is to ensure that if it is

> the intention of a divorcing couple to maintain estate benefits for the other, then it needs to be committed to writing. This is a reversal of the common law, which required the testator to take steps to exclude the former spouse from the benefits of their will, if they chose to do so.

[35] In **Re Thibault Estate**, at ¶ 18-20, Duncan J. reviewed **Matejka Estate**, agreeing with the underlying principle that "the presumption against retroactivity should apply where there is a prejudicial consequence imposed and where there has been no clear legislative intent to do so." Duncan, J. distinguished **Page Estate** on the basis that (as has been noted) there is no equivalent provision in the Nova Scotia *Wills Act* to s. 43 of the *Ontario Succession Law Reform Act.* As a result, Duncan J. concluded at ¶ 24:

> Section 19A of the Wills Act must be read prospectively. Such a conclusion is consistent with the general presumption that legislation should not be read retrospectively except where by clear language or necessary implication it should so operate. The language of the Act is clear and unambiguous, and there is no external evidence to suggest that the legislature intended a contrary conclusion.

[36] I agree with Duncan, J.'s conclusion in **Re Thibault Estate** that s. 19A of the *Wills Act* is forward looking in its effect and that it cannot be read retroactively or retrospectively. This must be so regardless of the fact that Nancy Hayward would not be entirely prejudiced by such a reading because she appears to have received a fair and appropriate division of all property upon divorce; which was approximately one-half of her and her husband's property.

[37] I shall now go on to consider the effect of the various provisions in the separation agreement and whether equitable estoppel applies to the present case.

The Separation Agreement

[38] The testator and Nancy Hayward signed a separation agreement dated June 28, 2004. Their intention was "to resolve matters of support and financial obligations and division of their property." They agreed that themselves, "their heirs, executors, administrators and assigns" were bound by the agreement. They further agreed "to execute and deliver ... any further documents, or to furnish any further information, or to perform any other act that the other party reasonably requires to give effect to the terms" of the agreement. Nancy Hayward conveyed her interest in the matrimonial home to the testator, and agreed that "she claims no

further interest therein, present or future." She conveyed or relinquished her interest in any other real property. The parties' vehicles, household furnishings, personal effects, bank accounts and pensions were divided "free and clear" from claims by one another. The agreement included a section in which the parties released rights in one another's estates:

> 17.01 The Husband and Wife each hereby release all rights which he or she might have under the laws of any jurisdiction to any share in the estate of the other or to the administration of the estate of the other, except as otherwise provided in this Agreement.

[39] The parties also released any rights and claims for maintenance or property division, including claims under the *Intestate Succession Act* and the *Testator's Family Maintenance Act*. Finally, the agreement provided:

> This Agreement is a full and final settlement of all matters outstanding between the parties and can be varied only by an agreement in writing between the parties or by a Court of competent jurisdiction.

[40] In **Morrell Estate v. Robinson**, 2008 NSSC 295, 2008 CarswellNS 530 (S.C.), the testator made a Will in 2002, after his marriage but before separation and divorce. The separation agreement provided (at section 20) that the parties "forever renounce and waive any claim in the estate of the other and any right to share in the estate of the other, whether such claim or right arises under statute or otherwise, including the right to administer the estate of the other in the event of the death of that party." The testator's will, however, left the residue of his estate to the wife. The issue was whether the wife had waived and released her right to inherit under the testator's will by executing the separation agreement. The testator's mother, who was the executor under the Will, submitted that the separation agreement was "intended to be 'a full and final settlement' between the parties and to effect a division of all their assets 'to their mutual satisfaction'." She argued that as a result, s. 20 of the agreement "effectively waives and releases [the wife's] right to inherit under the will" and that to hold otherwise "would have the effect of defeating the intent that the separation agreement be a full and final settlement."

[41] The **Morrell Estate** case was decided by Pickup, J. and he held that, while the wife "may have waived any claim against the estate of her late husband and the right to share in it, it is not clear from the wording of s. 20 of the separation

agreement that she waived her right to claim under the will if her husband chose not to alter his will so as to eliminate her as a beneficiary. There is no reference to a will in the separation agreement." As such, s. 20 of the separation agreement did not affect the wife's right to be the sole beneficiary under the will. Pickup, J. concluded as follows at ¶ 22-24 of **Morrell Estate**:

> Counsel for Ms. Robinson [the testator's mother] did not advance a clear legal rationale for finding that the words in this particular agreement should be given the effect he claimed. He agreed that the will was valid. In the absence of any challenge to the will, there would need to be compelling reasons to override the testator's intentions. The language of the separation agreement, which did not purport to revoke the party's wills, and did not use the word "will" in the section dealing with estate claims, does not permit this conclusion. It would have been possible for the separation agreement to include a clear waiver of the right of the parties to inherit under each other's wills, if this was their intention. I am not satisfied that any intention can be found in the language of the separation agreement.
>
> As the majority said in [*Pearson v. Pearson* (1980), 3 Man. R. (2d) 404 (Man. C.A.)], "[h]ad the deceased made a new will after the settlement with his wife, conferring benefits upon his wife, no one would question that she would be entitled to receive the benefits conferred by that new will. The failure to revoke the previous will amounts to the same thing. It is a constant affirmation of his choice to confer a benefit ...." .
>
> The above cases which were submitted by Ms. Robinson's counsel make it clear that a testator's intentions, as expressed in a valid will, should not be lightly interfered with. A spouse's right to claim against the estate or to share in the estate appears to be distinct from the testator's right to confer a benefit voluntarily. The separation agreement did not revoke the will, nor does it appear to have affected either party's ability to dispose of their estate as they saw fit. Therefore, the gift to Ms. Ostrom will stand. [Emphasis added]

[42] The testator's death in **Morrell Estate** predated the effective date of the s. 19A amendments to the *Wills Act* that create a presumptive revocation of a will when a marriage ends. Therefore S. 19 A was not an issue in that case.

[43] I have concluded, as discussed previously, that the current s. 19A does not have effect on the present Will of George Hayward. As in **Morrell Estate**, the wife in this case waived any right to share in the estate, or to administration of the estate. Unlike **Morrell Estate**, there is no separate reference to a "claim"; but this

does not provide a valid reason to distinguish **Morrell Estate**, which was ultimately premised on the failure to revoke the will. While the separation agreement in each case includes a waiver of any right to share in the estate or to administer the estate, it does not revoke the will and it cannot be taken to remove the testator's right to dispose of his estate as he saw fit.

[44] **Morrell Estate** was appealed and the Court of Appeal's decision was released in December of 2009, almost six months after the present case was argued, and is now cited as **Robinson v. Ostrom**, 2009 NSCA 127. I therefore invited additional written submissions from counsel in the present case.

[45] The Court of Appeal, in **Robinson v. Ostrom**, appears to disagree with the trial judge's inference that it may be possible to renounce a future testamentary gift with clear wording in a contract or separation agreement, absent a valid revocation of the will. This is so regardless of the consideration exchanged for the promise of a future renunciation. Oland, J.A. commented on this principle in **Robinson v. Ostrom** at ¶ 26:

> However, until the death of the testator, a person has nothing more than an expectancy and one cannot disclaim or renounce an interest in something to which he or she has no legal interest. In response to the court's questions and the jurisprudence, the appellant readily and correctly withdrew her argument that, when she signed the separation agreement, Ms. Ostrom had immediately renounced any interest in the testamentary gift. [Emphasis added]

[46] Oland, J.A. also cited with approval the following passage from **Re Smith**, [2001] 3 All E.R. 552 (Ch.) in ¶ 28 of her decision:

> [10] Now contrast a case such as the present. At the date of the disclaimer the intended donee has no interest whatsoever. He or she has a mere expectancy. Any existing wills might or might not be revoked or varied; any existing intestacy might or might not persist until the death of the deceased. There are no proprietary rights, or other rights to control the destination of the estate in any way. What, then, is there to be disclaimed, or (as a matter of analysis) avoided? In my view the answer is nothing. A disclaimer bites on something that can be disclaimed; on a transaction which can in some way be said to be an attempt to make a gift. The testamentary intentions of a living person do not fall within that category. Until the death there is simply nothing that can be disclaimed and any attempt to disclaim is invalid and ineffective. [Emphasis added]

[47] Oland, J.A. commented further on this principle at ¶ 30, 31 and 37 of **Robinson**:

> [30] In the case under appeal then, when she signed the separation agreement, Ms. Ostrom could not and did not immediately renounce any interest in the estate of the late Mr. Morrell pursuant to his will. At that time, there was nothing more than an expectancy. In the words of *Re Smith, supra*, there was nothing on which a renunciation could "bite".
>
> [31] Now that Mr. Morrell has died, Ms. Ostrom could renounce or refuse her interest as residuary beneficiary under his will. However, she does not wish to do so. On the contrary – she seeks to take the benefits for herself pursuant to that will.
>
> [37] As shown earlier in this decision, *Biderman, supra* and *Wolfson Estate, supra* stand for the principle that a voluntary disclaimer of a future interest has no legal effect. In the result, the appellant has not provided any Canadian and English authority in which a renunciation or disclaimer executed before the death of the testator, whether without consideration or for consideration, has been found to be legally effective. [Emphasis added]

[48] Oland, J.A. dealt further with arguments regarding disclaimers in advance of death by dealing with the issues of consideration and privity of contract in the context of S. 28 of the *Matrimonial Property Act, R.S.N.S. 1989, c. 275.* In view of the following comments of Oland, J.A. in **Robinson**, supra, it is doubtful that Michael Hayward would have any standing to contest the Will by virtue of the separation and divorce agreements made between George and Nancy Hayward. Note the following ¶ 43 and 44 in the **Robinson** judgment:

> [43] Finally, while acknowledging that voluntary disclaimers in advance of death are void, the appellant argues that a contractual renunciation supported by consideration should be upheld:
>
> . . .
>
> However, the appellant has failed to produce any legal authority that a contractual promise to renounce, given for consideration before the death of a former spouse, binds a person to renounce a testamentary gift after his death.
>
> [44] The remedy the appellant seeks is specific performance of the alleged renunciation in clause 20 of the separation agreement. That agreement is, of

> course, a contract. The parties to the contract were Ezra Morrell and Ingrid Ostrom, and its clause 2 states that its terms are binding on their heirs, administrators, executors, successors and assigns. The appellant was not a party to the separation agreement, nor is she one of the persons named under clause 2. Even if it had been determined that Ingrid Ostrom was contractually bound to refuse the testamentary gift, there does not appear to be any privity of contract between the appellant and Ingrid Ostrom which would allow the appellant to enforce clause 20 of the separation agreement. It is the executrix who is permitted, but not mandated, to enforce a separation agreement (*Matrimonial Property Act, R.S.N.S. 1989, c. 275, s. 28*).

[49] In the present case, the named executrix of the estate is the former wife of the deceased testator and the one claiming the benefit under the Will. It is therefore unlikely that she will take any legal proceedings against her stated intent and interest.

[50] I must therefore rule that the alleged waivers or renunciation contained in the Haywards' separation and divorce documents do not contractually bind Nancy Hayward in the present case. I will, nevertheless, go on to consider whether there are any equitable principles which would estop Nancy Hayward from claiming the entire benefit under George Hayward's Will.

Equitable Estoppel

[51] The principles of promissory estoppel – a form of equitable estoppel – were set out in **John Burrows Ltd. v. Subsurface Surveys Ltd.**, [1968] S.C.R. 607. Ritchie, J. said, for the Court at pp. 614-615:

> Since the decision of the present Lord Denning in the case of *Central London Property Trust Ltd. v. High Trees House Ltd.* [[1947] K.B. 130], there has been a great deal of discussion, both academic and judicial, on the question of whether that decision extended the doctrine of estoppel beyond the limits which had been theretofore fixed, but in this Court in the case of *Conwest Exploration Co. Ltd. et al. v. Letain* [[1964] S.C.R. 20 at 28] , Mr. Justice Judson, speaking for the majority of the Court, expressed the view that Lord Denning's statement had not done anything more than restate the principle expressed by Lord Cairns in *Hughes v. Metropolitan Railway Co.* [(1877) 2 App. Cas. 439] , in the following terms:
>
> > It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms, involving certain legal results — certain penalties or legal

> forfeiture — afterwards by their own act or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties.

In the case of *Combe v. Combe* [[1951] 1 All E.R. 767] , Lord Denning recognized the fact that some people had treated his decision in the *High Trees* case as having extended the principle stated by Lord Cairns and he was careful to restate the matter in the following terms:

> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

It is not enough to show that one party has taken advantage of indulgences granted to him by the other for if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms.

As Viscount Simonds said in *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [[1955] 2 All E.R. 657]:

> . . . the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position. I lay stress on this, because I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights . . .

[52] In **Maracle v. Travellers Indemnity Co. of Canada**, [1991] 2 S.C.R. 50, 1991 CarswellOnt 450, Sopinka, J. said for the Court at ¶ 13:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, 68 D.L.R. (2d) 354, Ritchie J. stated [at p. 615, S.C.R]:
>
> > It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.
>
> This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641 ... at p. 647. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.

[53] According to the Nova Scotia Court of Appeal in **White v. Halifax (Regional Municipality) Pension Committee**, 2007 NSCA 22, 2007 CarswellNS 68, **Maracle** stands for the proposition that "[t]o found a promissory estoppel, there must be an unambiguous promise or assurance given by one party to another . . . ."

[54] In **Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.**, [1994] 2 S.C.R. 490, 1994 CarswellAlta 769, Major, J., for the Court at ¶ 18, linked estoppel and the doctrine of waiver, stating that “[r]ecent cases have indicated that waiver and promissory estoppel are closely related. . . . The noted author Waddams suggests that the principle underlying both doctrines is that a

party should not be allowed to go back on a choice when it would be unfair to the other party to do so. . . ."

[55] There appears to be no equitable estoppel caselaw which is near enough to the present circumstances to provide much guidance. The question of estoppel has been raised in the specific case of applications under testators' family maintenance legislation where there has been a separation agreement. In **Ward v. Ward**, 2006 BCSC 448, 2006 CarswellBC 667 (B.C.S.C.), for instance, the testator and the plaintiff (the wife) signed a marriage agreement before they were married, by which the wife agreed not to make claim under the *Wills Variation Act*. The parties also waived any right to share in one another's estates in the event of intestacy. The wife was not provided for in the will, and, after the testator's death, commenced an action for maintenance under the *Wills Variation Act*. The defendants – who were the testator's sons from a previous marriage – argued that the wife was estopped from claiming under the *Act* by virtue of the marriage agreement. The chambers judge at ¶ 31-34, held that she was not so estopped, and that a trial was necessary to determine whether the circumstances indicated a moral obligation on the part of the testator to provide for the wife. There was no technical discussion of estoppel. The separation agreement in **Ward** included an explicit waiver of the statutory claim. By contrast, in the present case, there was no waiver of a right to receive under the Will, nor was there any revocation of the Will. In order for the wife in the present case to be estopped from acting as administrator or accepting a devise or bequest under the Will, there would need to be evidence that she "entered into a course of negotiation" that led the testator "to suppose that the strict rights under the contract would not be enforced," as well as evidence from which it can be inferred that the wife "intended that the legal relations created by the contract would be altered as a result of the negotiations." (See the **Burrows** case at p. 615). As Sopinka, J. put it in **Maracle** at ¶ 13:

> [t]he party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

[56] It is therefore difficult to fit the present circumstances within the technical boundaries of estoppel. This may be an issue which is best argued in a *Testator's Family Maintenance Act* proceeding. At best, the separation agreement could bar

Nancy Hayward from advancing a claim against the estate. On the other hand, the Will, on its face, makes her the administrator and beneficiary. The separation agreement, meanwhile, does not refer to a Will and I find that it cannot be read as a promise or assurance that she would forgo any right to receive under the Will or to administer the estate should the testator make such an indication in the Will. There is an unambiguous promise in the separation agreement not to advance a claim; but that does not seem to extend to receiving under the Will. Attempting to apply the principles of estoppel to the separation agreement brings us to the same result as **Robinson v. Ostrom**, supra.

Post Trial Briefs

[57] As I stated previously, I invited counsel to respond to our Court of Appeal's decision in *Robinson, supra,* before I finalized this judgement. I received the last written submission January 28, 2010. Counsel for Nancy Hayward was of the view that the *Robinson* decision did not alter his client's position; however, counsel for Michael Hayward advanced several new arguments which had not been raised at the hearing and which, did not appear to arise directly from the *Robinson* decision. Nevertheless, those new arguments were responded to by counsel for Nancy Hayward. I shall deal with those arguments now.

(i) the *Robinson* decision and S. 28 of the *Matrimonial Property Act*

[58] In his first Supplementary argument, counsel for Michael Hayward quotes from ¶ 43 and 44 of the *Robinson* decision and he invokes s. 28 of the *Matrimonial Property Act* which states:

> "A marriage contract or a separation agreement, or a provision thereof, that has its effect on the death of one of the parties thereto may be enforced by or against the estate of the deceased."

[59] In my opinion this issue was decided in *Robinson* when Oland J. A. rejected the applicability of s. 28 in circumstances similar to the present case. The paragraph 21 cited in ¶ 43 of *Robinson* is a quote from counsel's brief and they are not the comments of Justice Oland. Michael Hayward would distinguish the *Robinson* case because he is presently the administrator of George Hayward's estate with the Will annexed; and that therefore he should have standing to enforce the Separation Agreement pursuant to s. 28 of the *Matrimonial Property Act*.

However, this reasoning in circular and not persuasive because one of the two issues on this application is the rightful executor or administrator of George Hayward's estate. Michael Hayward has also sought to distinguish the ***Robinson*** case on the basis that the release clause contained in the Hayward Separation Agreement is forward looking as opposed to speaking in the present tense as the ***Robinson*** case and other precedents seen to indicate; however, I do not see that as such a significant difference that it would lead to a different conclusion. In my opinion the reasoning enunciated in ***Robinson*** would still lead to the same result in the present case.

(ii) to my said wife

[60] The argument advanced on behalf of Michael Hayward in the above noted regard is based on the interpretation of Wills and efforts by the courts to ascertain the intentions of the testator so that his property is disposed of in the way he wished.

[61] Michael Hayward submits that the use of the words "to my said wife" in the Will is significant. He refers to *Marks v. Marks* (1908), 40 S.C.R. 210, where a will used the phrase "to my wife," without a name. Two different women claimed to be the "wife" named in the will. The testator had apparently abandoned the first wife (the appellant) in 1878. He married the respondent, a bigamist union, in 1902 and made his will and died in 1904. The surrounding circumstances led the majority, *per* Idlington J., to the conclusion that the testator had not considered the appellant, the first wife, to be his wife when he made the will.

[62] Michael Hayward also offers *Marion v. Marion*, 2009 CanLII 9443 (Ont. S.C.J.) as a recent authority on the interpretation of wills. In *Marion*, Warkentin J. took note of the dissent of Lord Denning in *Re Rowland (deceased); Smith v. Russell and Others* [1962] 2 All E.R. 837 (C.A.), where Lord Denning said the task in interpreting the language of a will is to "place yourself as far as possible in [the testator's] position, taking note of the facts and circumstances known to him at the time, and then say what he meant by his words. Warkentin J. observed that this was similar to the approach in *Marks* and in *Re Burke* (1959), 20 D.L.R. (2d) 396, 1959 CarswellOnt 98 (Ont. C.A.). In the latter case, Laidlaw J.A. said, for the majority:

> The Court is now called upon to construe a particular document and, at the outset, I emphasize what has been said before so frequently. The construction by the

> Court of other documents and decisions in other cases respecting the intention of other testators affords no assistance whatsoever to the Court in forming an opinion as to the intention of the testator in the particular case now under consideration. Other cases are helpful only in so far as they set forth or explain any applicable rule of construction or principle of law. Each Judge must endeavour to place himself in the position of the testator at the time when the will was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give due weight to those circumstances in so far as they bear on the intention of the testator. He should then study the whole contents of the will and, after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator. When an opinion has been formed as to that intention, the Court should strive to give effect to it and should do so unless there is some rule or principle of law that prohibits it from doing so.

Warkentin J. Added, in *Marion*:

> The term "surrounding circumstances" has been interpreted to mean the indirect extrinsic evidence consisting of the character and occupation of the testator, the amount, extent and condition of his property and the number, identity and general relationship of immediate family and relatives to the testator. It can be presumed that the testator was at least familiar with the nature and extent of his assets and his liabilities at the date that he made his Will.
>
> While the Court is expected to examine indirect extrinsic evidence, the Court should not consider extrinsic evidence of direct intent when there is a reasonable interpretation of the words that were actually used in the will. Resorting to the extrinsic evidence of direct intent would provide an inconsistent result with the reasonable interpretation of the words in the Will itself.
>
> Extrinsic evidence of direct intent includes instructions the testator gave his solicitor and other evidence of third parties attesting to the testator's intentions. There are certain specific exceptions to the rule where extrinsic evidence of direct intent may be considered, but those exceptions are not applicable in this case.

[63] The distinction between *Marks* and the present situation is that the Hayward will *named* Nancy Hayward. It did not use the word "wife" without further specifics, as occurred in *Marks*. Michael Hayward submits that the phrase "my wife" does not mean "ex-wife" or "former wife", which is the status of Nancy Hayward after the divorce. On the basis of the rules of construction derived from *Marks*, *Burke* and *Marion*, Michael Hayward says it is necessary to ask whether the

testator's use of the words "my said wife" was intended to "include" Nancy Hayward if she was his "ex-wife" or "former wife." He argues that this was not his intention. Nancy Hayward answers as follows in her supplementary brief:

> Mr. Hayward did not remarry after his divorce from Nancy Hayward so he clearly did not have a "wife" at the time of his death. Furthermore, the will clearly refers to Nancy Vera Hayward using her full name. The Will could not be any clearer and as such there is no need to refer to any rules of interpretation, or Section 8A of the *Wills Act*.

[64] I find that there is more to be said for Nancy Hayward's reasoning than for that of Michael Hayward.

(iii) **Amendment of the Will**

Section 8 A 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.

[65] The separation agreement is "a writing" that was not executed in compliance with the formal requirements of the *Wills Act*. Michael Hayward says the separation agreement expressed an intention by his father to alter his "testamentary intentions," in that it "expressed testamentary intentions of George Hayward that the agreement was a final settlement between the Haywards." This would be a strained application of s. 8A, given that the separation agreement made no reference to Mr. Hayward's Will. I therefore find that s. 8A could not operate to revoke Mr. Hayward's Will.

(iv) the "ethical" argument

[66] Michael Hayward argues that there is an "ethical" basis for interpreting the words "my said wife" to exclude Nancy Hayward. He says;"Nancy Hayward petitioned for a divorce from George Hayward. The divorce terminated their marriage, and her status as his wife." He relies on the "preclusion doctrine." This "doctrine" appears to be somewhat of a variation on the principles of equitable estoppel. In *Downton v. Royal Trust Co. et al.*, [1973] S.C.R. 437, the testator had obtained a divorce from the appellant (his first wife) in Nevada. The parties had been separated, and a separation agreement was in place. The appellant lived in Newfoundland, but submitted to the jurisdiction of the Nevada court. The separation agreement was incorporated into the divorce judgment. As soon as the Nevada divorce was finalized, the testator remarried and returned to Newfoundland with his second wife. After his death, the appellant brought an application under the Newfoundland *Family Relief Act*. The court held that the "preclusion doctrine" would prevent:

> a spouse who, having obtained a decree of divorce or nullity from a foreign court incompetent to give it, seeks thereafter to assert that incompetence in order to gain a pecuniary advantage against his or her spouse or the estate of the spouse. *The doctrine has an ethical basis: a refusal to permit a person to insist, to his or her pecuniary advantage, on a relationship which that person has previously deliberately sought to terminate.* The ethical basis is lost, however, where there has been both invocation and submission to the foreign jurisdiction by the respective spouses; and if there is to be a modification or rejection of the preclusion doctrine in respect of one or both of the spouses, other considerations must be brought into account; there may be, for example, an alleviating explanation for the submission to the jurisdiction of an incompetent foreign court. So too, where third parties are involved in a case where a spouse who has obtained an invalid foreign divorce or decree of nullity seeks to rely on its invalidity. [Emphasis added in original judgement]

[67] In *Downton*, the court concluded that, in the circumstances, the preclusion doctrine did not bar the appellant's claim:

> In the present case, I am satisfied that the lawful wife submitted to the foreign court as she did to protect her existing benefits which were given as a result of her separation from her husband in Newfoundland. Her submission was, accordingly, a special one and could have no effect against her in Newfoundland in enforcing

> the separation terms, since she would not have to rely there upon the foreign decree in order to enforce them. This is not a case where the appellant's maintenance benefits rested on the foreign divorce decree alone and where she had taken those benefits until the deceased's death, and then sought to assert that she was the lawful wife in order to gain additional benefits.

[68] Michael Hayward submits that Nancy Hayward "voluntarily agreed to terminate her relationship with George Hayward by her Petition for Divorce" and so "should be stopped from claiming a gift under George Hayward's Will as 'my said wife.' Nancy Hayward says *Downton* has no application because the present claim does not arise under legislation, but was "a benefit freely conferred on her by Mr. Hayward, for which he was free to change at any time between the date of the divorce and the date of his death." It seems to me that Nancy Hayward is essentially correct. The preclusion doctrine as described in *Downton* does not appear to prevent an ex-wife from receiving a testamentary gift that is voluntarily given simply because the parties divorced.

(v) testamentary intention

[69] Michael Hayward makes the concluding remark that "it is not the testamentary intention of George Hayward to benefit an ex-wife under his Will, but his intention to benefit his son, Michael Hayward." The problem with this bare assertion is that there is no evidence to support it. Under the Will, Michael Hayward is the residual beneficiary. For better or worse, the Will is the only available evidence of testamentary intention. The Separation Agreement has already been found to be insufficient evidence of testamentary intention and ineffective to revoke George Hayward's Will.

[70] I find that none of the new arguments raised on behalf of Michael Hayward are sufficient to overcome the principles enunciated by out Court of Appeal in *Robinson*.

Conclusion

[71] What is troubling about the present case is that the former wife, Nancy Hayward, received approximately one half of her deceased husband's net worth upon the divorce, and she now seeks the other half to the exclusion of their son, Michael Hayward. This, on its face, appears to be the very situation which s. 19A of the *Wills Act* was intended to remedy. Nevertheless, having said that, as I

alluded to before, it would appear that Michael Hayward's remedy, if any, lies by way of an application under the *Testators Family Maintenance Act*, if he chooses that course of action.

[72] In the result, the application to revoke the grant of administration issued to Michael Hayward is granted and the Will of George Hayward is declared to be in full force and effect.

Costs

[73] Each party shall have their costs, on a solicitor/client basis, paid out of the Estate of the Late George Hayward.

Order

[74] I will grant an order accordingly, prepared by counsel for Nancy Hayward, and consented as to form by counsel for both parties.

_____

Boudreau, J.