SUPREME COURT OF NOVA SCOTIA
Citation: Synott v. Bartlett Estate, 2010 NSSC 477

Date: 20110117
Docket: Tru. No. 327067
Registry: Truro

Between:

Raylene Synott

Applicant

v.

Estate of Raymond Alvin Bartlett

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	October 5, 2010, in Truro, Nova Scotia
Oral Decision:	December 20, 2010
Written Decision:	January 17, 2011
Counsel:	Raylene Synott, self-represented Raymond Bartlett, Executor

By the Court:

[1] This is a reference from the Registrar of Probate for the district of Truro in respect of the will of the late Raymond Bartlett. The applicant brings the application pursuant to s. 64(3) of the *Probate Court Practice, Procedure and Forms Regulations*, N.S. Reg. 119/2001, respecting the division of furniture and personal effects of the estate. She seeks an order for the disbursement of certain personal items from the estate. The question to be decided on this application is whether the applicant is entitled to receive certain personal effects, or whether the discretion of the executor is absolute, as appears to be the case under the will.

[2] The testator executed a last will and testament appointing the respondent, Raymond Anthony Bartlett Jr., the sole executor and trustee of his estate. The applicant and the respondent executors are siblings, and are children of the testator. Paragraph 2(c) of the will deals with the executor's discretion to divide the personal effects and household items. It provides as follows:

> ... to divide all articles of furniture and personal effects and all articles of domestic and household use and ornament situate in and about my place of residence among my five children, namely, RAYMOND ANTHONY BARTLETT, LYNN CORMIER, GAIL BELANGER, RAYLENE SYNOTT and MARLENE HEIDMAN, or the survivor of the five of them at the date of my death, in such proportions, and not necessarily in equal proportions, and in such manner as my Trustee, in my Trustee's absolute discretion, thinks or considers proper or appropriate and provided that in the absolute discretion of my trustee all

> or any of such articles may be sold and the proceeds of the sale shall form part of the residue of my estate.... [Emphasis in original.]

[3] On September 20, 2009, the executor convened a meeting with the applicant and their three other sisters for the purpose of dividing various items of the estate that had sentimental value to each sibling. A significant dispute arose between the applicant and the executor respecting the division, and the applicant was forcibly ejected from the family home. She attended at the police station to complain that she had been assaulted by the executor. The police attended at the residence, although no charges were laid. As a result of this altercation, the animosity between the applicant and the executor was exacerbated, and it is clear that it had not diminished by the time this application was heard.

[4] As a result of the executor being unwilling to part with any of the personal and household effects which the applicant had identified as being of interest to her, the applicant filed an application on March 31, 2010 seeking an order directing the trustee give up the items to her.

[5] The executor testified that following of the receipt of the Notice of Application, he met with the solicitor for the estate, James F. Richards, Q.C, to

discuss the applicant's request. After this meeting, Mr. Richards directed a letter to the applicant outlining the terms upon which certain items would be delivered to her, with a requirement that she release any claim against the trustee. One of the terms of the offer was that the applicant instruct the Registrar of Probate that she would be seeking an adjournment of the application scheduled for June 15, 2010, to allow sufficient time for the parties to arrange for the delivery to the applicant of the agreed items of personal property. She was also asked to sign a receipt and release. This was confirmed to the Registrar of Probate by Mr. Richards by letter of June 11, 2010.

[6] Following the receipt of this offer from Mr. Richards, the applicant contacted the Court of Probate and arranged to adjourn the intended application.

[7] The executor claims that Mr. Richards had no authority to transmit any offer to the applicant. He testified that Mr. Richards threatened that if he was not able to send this letter to the applicant, he would withdraw as lawyer for the estate. However, it is apparent that the executor was aware that the letter was sent and made no efforts to send any correspondence to Mr. Richards within any reasonable period of time to revoke the offer, nor am I aware of any complaint to the Nova

Scotia Barristers Society with respect to Mr. Richards' conduct. However, the executor did terminate Mr. Richards as solicitor for the estate.

[8] At the hearing, the executor stated that there were several items that were mistakenly added to the list provided by Mr. Richards to the applicant that were not identified either by him or by the applicant as items she was seeking.

Decision

[9] I am very mindful that the testator, Mr. Bartlett Sr., provided absolute discretion to his son, the executor, to divide all articles of furniture and personal effects among the children. In addition, the will provides that the executor, in his absolute discretion, may decide not to divide certain property and may instead sell the property, with the proceeds of sale to form part of the residue of the estate. In this instance, the applicant's three sisters have received items of household or personal effects and as they did not participate in this hearing, I infer that they are satisfied with the allocation that they received of personal and household effects.

[10] It goes without saying that the executor must act impartially. As executor, Mr. Bartlett owes a duty to all of the beneficiaries to perform his duties impartially. I refer to *Waese v. Bojman* (2002), 50 E.T.R. (2d) 139, 2002 CarswellOnt 5216 (Ont. Sup. Ct. J.) where the court said, at para. 37:

> [T]he powers and discretions of the Trustees are to be exercised solely in the interest of the beneficiaries and not for any other purpose such as the continuation of the Testator's business as an end in itself. They must also be exercised impartially and without any bias for, or against, one or some of the beneficiaries subject always, of course, to any contrary intention evident in the terms of the Will...

[11] Mr. Bartlett's will expressly permits the executor to make a unilateral and absolute decision to distribute the furniture and personal effects of the estate in an uneven manner as between beneficiaries or to sell, and not distribute, such items as he deems fit.

[12] There is a high threshold to overcome before the Court will interfere with such a broad discretion afforded to an executor under a will. In *Re Bell* (1923), 23 O.W.N. 698, [1923] O.J. No. 691 (Ont. Sup. Ct. – H.C.J.), the Court held that an executor's exercise of discretion should only be interfered with where the applicant can show that the executor acted in bad faith. In contrast, in *Re Davis* (1983), 14

E.T.R. 83, 1983 CarswellOnt 608 (Ont. C.A.), the Court held that the executrix should be removed despite the lack of evidence of bad faith because there was such a degree of hostility between the executrix and the beneficiaries of that the executrix could no longer act impartially.

[13] It is obvious that in many instances, there will be a natural dynamic in favour of or against the exercise of discretion by the executor in relation to the allocation of benefits to beneficiaries under the will. Some beneficiaries will be satisfied with the exercise of that discretion, while others will not be. The possibility for internal conflict is immense, and the possibility for allegations of bias could always be present, since it may be alleged that an executor or trustee is treating a beneficiary differently due to a bias against that person.

[14] It is, in my opinion, the right of a testator to leave a discretion in the hands of the executor to treat beneficiaries differently based on their needs at the time of the testator's death. These needs may change from time to time; a beneficiary without need at the time the will is executed may be the person in the greatest need at the time of the testator's death.

[15] After carefully listening to the applicant and the executor, I conclude that the level of animosity between the two of them is extreme. A meeting that was held to divide the personal property and effects of the estate degenerated to the point that the police attended at the home. The executor effectively removed the applicant from this meeting. The applicant acknowledged that she had received or removed three items from the house that she did not disclose to the executor. However it is apparent that the testator did not want her to remove anything from the house. Although she had set aside some articles for removal, none of these items were turned over to her by the executor. Obviously, there are some items that she marked for her benefit that could not be hers because others had expressed an interest in them and it would be necessary for the trustee to decide. Such a decision was not one she could challenge, on account of the discretion granted by the will.

[16] Before me, the executor took the position that the solicitor for the estate unlawfully offered to settle the matter and that as executor he had the full discretion to give nothing further to the applicant even though his other sisters had all received their requested items. In my view, the level of animosity between the

two, namely the applicant and the respondent, is sufficient to establish a bias on the part of the executor that impugns his impartiality.

[17] I recognize that the applicant did not seek either an accounting from the executor or his removal, which would be appropriate approaches to take under the *Probate Act*. Nonetheless, I believe that the applicant has the right to seek an order from this Court if not under the Act, then pursuant to s. 67 of the *Regulations*, which provides:

> Without limiting the powers of the court, the registrar, on hearing an application under this Part, may
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> (a) receive evidence by affidavit or orally;
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> (b) dispose of issues arising out of the application;
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> ...
>
> (e) grant any relief to which the applicant is entitled because of a breach of trust, wilful default or other misconduct of the respondent;
>
> ...
>
> (k) make any order the registrar considers appropriate in the circumstances.

[18] As the matter is before this Court, I am authorized to exercise the jurisdiction the Registrar could exercise if she was hearing the matter.

[19] The applicant did not take steps to seek a passing of accounts or for the removal of Mr. Bartlett as executor. She did, however, act on the letter she received from Mr. Richards, the solicitor for the estate, and adjourned the proceeding.

[20] In his testimony, the executor claimed that Mr. Richards threatened to withdraw his services if he did not consent to the applicant's request, and that the solicitor acted without authority in making a settlement offer. Obviously, this is a serious allegation, which, if proven true, could subject Mr. Richards to disciplinary proceedings. However, it is also abundantly clear that there is absolutely no evidence on the record to support any of these allegations. Indeed, I am not aware that the executor made any complaint to the Nova Scotia Barristers Society regarding the conduct of the estate solicitor. It is also clear that he did not contact Mr. Richards after receiving a copy of the June 10, 2000, letter in order to inform him that the settlement offer was improperly made. It is my view that such

allegations are misleading in the extreme and I reject them categorically. I do not accept the executor's allegation that he told Mr. Richards not to write that letter, particularly where such allegations are made in the absence of Mr. Richards.

[21] It is my view that settlement agreements are binding contracts and furthermore, that an agent may contractually bind his principal. Consideration for such an agreement does not have to be of any monetary value.

[22] In *IPC Insurance Strategies Inc. v. Sawa*, 2009 SKCA 80, 2009 CarswellSask 461, counsel for the defendants made a settlement offer, which after consideration with his client, counsel for the plaintiffs accepted. The plaintiffs then attempted to withdraw from the agreement on the basis that the plaintiff's health prevented him from fully understanding the settlement offer. The defendants applied for a declaration that the settlement agreement was binding on the plaintiffs. In finding that the agreement was binding, the Saskatchewan Court of Appeal stated, at para. 15:

> ... [I]t is an accepted tenet of agency law that where an agent contracts on behalf of his principal, it is as if the principal had entered into the contract himself. It is also well-established that the relationship of a counsel and his client is one of agent and principal, and includes the authority on the part of counsel to bind the

> client to a settlement agreement, unless the client has limited counsel's authority and the other parties to the action have knowledge of the limitation.

[23] In this case, there is no evidence which I have found worthy of belief that the executor limited the authority of Mr. Richards, as solicitor for the estate, to engage in settlement discussions with the applicant. Even if this were the case, there is no evidence that the executor conveyed this limitation to the applicant. It is my conclusion that Mr. Richards had the authority to extend a settlement offer. That offer was the disbursement of the items the applicant requested in exchange for the applicant releasing the estate from any further request. I acknowledge that there are four or five items that were not to be included in the list, which the applicant acknowledges.

[24] In addition, to consensus *ad idem,* a binding contract requires acceptance and a valuable consideration. Valuable consideration "may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other": see *Re Greenough Estate*, 2008 NSSC 355, 2008 CarswellNS 659, at para. 113, citing *Anger & Honsberger Law of Real Property*, 3rd ed. (Aurora: Canada Law Book, 2008) at p. 25-18. A decision not to bring an action against an estate has been held

to be adequate valuable consideration, regardless of the merits of the proposed action: *Francis v. Allan* (1918), 57 S.C.R. 373.

[25] The applicant signified her acceptance of the terms of the offer made by Mr. Richards by filing an adjournment without day in the proceedings. This constituted valuable consideration sufficient to form a binding settlement agreement. Although the applicant did not specify the nature of the cause of action – that is, that she did not plead breach of contract – I am satisfied that this Court has jurisdiction to determine the claim she has advanced. I am left to determine whether there was a binding and valid settlement agreement. I find that there was.

[26] The Court will not, in most instances, interfere with an executor's discretion unless the applicant can satisfy the Court that the executor has acted in bad faith or that he demonstrated a clear bias for or against the applicant to such a magnitude that the executor cannot be expected to act impartially. Certainly, at the very least, bias may be inferred from animosity between the executor and the applicant. There was animosity between the applicant and the executor at the meeting held to distribute to divide the household and personal items. This animosity continued into the hearing. Their differences appear to be, for the moment, irreconcilable.

The executor demonstrated his bias against the applicant by using his discretion to prevent her from obtaining the furniture and personal items of her father's that she sought, even though the rest of the siblings were able to claim their requested items.

[27] My conclusion is supported by a reasonable interpretation of the terms of the will and by the letter of commitment by Mr. Richards that these items would be turned over to the applicant should she request an adjournment of the proceedings without day and execute a release in favour of the estate.

[28] I am satisfied that the parties are bound by the terms of the settlement. The application is therefore allowed. The executor is directed to deliver to the applicant the items identified in the letter from Mr. Richards as being items that would be transferred to the applicant. The applicant will be required to provide a release and receipt, as called for in the letter. The items to which the applicant is entitled do not include the items removed by the applicant that were not referred to in the letter; in her evidence she said she had removed a camping toll, a gold toothpick and a pair of her mother's earrings. In addition, I conclude the applicant is not entitled to the gold pendant, the black onyx and gold cross and the law

school ring. In addition, the executor shall be entitled to exercise his discretion with reference to items 3, 9, and 19 on the Richard letter of June 10, 2010.

[29] In the circumstances of this case, there will be no award of costs.

J.