SUPREME COURT OF NOVA SCOTIA
Citation: Thompson v. McKenney Estate, 2011 NSSC 488

Date: 20111229
Docket: YarNo. 330966
Registry: Yarmouth

IN THE ESTATE OF DONALD ROBERT MCKENNEY, Deceased

Between:

Sonia Wanda Thompson

Applicant

v.

Estate of Donald Robert McKenney

Respondent

Decision

Judge: The Honourable Justice Kevin Coady

Heard: November 21 & 22, 2011, in Barrington, Nova Scotia

Decision: December 29, 2011

Counsel: Gregory D. Barro, for the Applicant
Celia Melanson, for the Respondent

By the Court:

BACKGROUND:

[1] Donald McKenney died at Yarmouth, Nova Scotia on December 4, 2009 at the age of 68 years. Mr. McKenney was married to Susan McKenney and they divorced in 1976. They had three children, namely Kendall, Sonia and Dwayne. Mr. McKenney lived in a common law relationship with Elsie Baron for 18 years until they separated in 2007. The estate of Mr. McKenney at the time of his death consisted of less than $3000, a 2007 Dodge truck and an interest in real property in Shelburne County. The Applicant Sonia Thompson is the only member of this family who is involved in this litigation.

[2] Kendall McKenney lives in the Shelburne area and was estranged from his father for many years. Susan McKenney testified that the deceased was physically and psychologically abusive of Kendall, and as such, they never reconciled. Ms. McKenney and Ms. Thompson testified that Mr. McKenney suffered from alcoholism most of his adult life.

[3] Sonia Thompson's relationship with her father was described by Susan McKenney as non-abusive. She described Sonia as the "apple of his eye." Sonia testified her father was very loving and affectionate towards her notwithstanding his alcoholism and his prickly personality. There is much evidence that challenges this characterization of their relationship.

[4] Dwayne McKenney died on March 9, 2009 in Alberta after a life long struggle with cancer. Susan McKenney testified that Dwayne and his father "got along well" but that he was nervous around his father. She described Dwayne as "always loyal to his dad." I am satisfied that their relationship was far more loving than Mr. McKenney's relationship with Kendall and Sonia.

[5] The totality of the evidence clearly establishes that Donald McKenney's relationship with his children was dysfunctional. He drove them away with his alcoholism and abuse. They experienced various degrees and durations of estrangement. This family did not operate as a family. The evidence also establishes that Mr. McKenney had very few friends and generally kept to himself. He was stubborn and was not one to do anything against his will. He befriended

only those he viewed as loyal to him and had no time for those who saw life in a different way.

THE LIFE OF DONALD MCKENNEY:

[6] Donald and Susan McKenney married in their teens. Apparently at the start Mr. McKenney was quiet, not very social and not a drinker. Susan McKenney testified that after separation he became “a full-blown alcoholic” and “not a very nice person.” Dwayne first became sick at 18 years of age. After achieving remission he returned to Shelburne and lived with his father for four years. When the cancer returned Dwayne moved to Alberta with his mother where he lived for the remainder of his life.

[7] In September, 2008 Mr. McKenney spent three months in Alberta visiting Dwayne. In March 2009 he visited for a further two weeks. He often saw Sonia and Susan at the hospital. Mr. McKenney was heartbroken when Dwayne died. He made a third trip to Alberta after Dwayne’s death to acquire Dwayne’s pride and joy, a blue 2007 Dodge Ram Hemi Truck. Obviously Mr. McKenney had an emotional attachment to Dwayne’s vehicle. I find that for many years (1980-2007)

Mr. McKenney had very little contact with his Alberta family. Any contact was tied to Dwayne's precarious health. During these years Mr. McKenney lived with Ms. Baron in a small cottage with no bathroom, no hot running water and heated with wood. He worked at odd jobs around Shelburne and sometimes worked as a long haul truck driver.

[8] In 2002 Mr. McKenney was driving a truck in Temple, Texas when he suffered an aneurysm. This attack resulted in an extended hospital stay in Texas. Sonia Thompson flew to Texas to see and care for her father. After four weeks it was apparent that Mr. McKenney did not want to speak to her. She returned to Alberta and had no further contact with her father until 2008.

[9] The hospital in Texas wanted to release Mr. McKenney and he had no way to get back to Canada. Elsie Baron contacted Patricia and Warren Harris, Mr. McKenney's only real friends. The Harris' and Ms. Baron decided to drive to Texas to collect Mr. McKenney. The three drove to Texas over three days. They picked him up and immediately drove him to the Shelburne Hospital. The Harris' paid the cost of the trip save for $1000 donated by Mr. McKenney's sister.

[10] Upon release from the hospital in October 2002 the Harris' provided a cottage in which Mr. McKenney and Ms. Baron lived. Their original home was not equipped to provide the care Mr. McKenney required. This residence was provided at no cost. In the spring of 2003 Mr. Harris purchased a used trailer and moved it to a salvage yard he owned in Shelburne County. He hooked up the utilities and allowed Mr. McKenney to move in and act as a night watchman. Mr. McKenney resided at this location free of charge, except for utilities, until his death in 2009. Mr. Baron left Mr. McKenney in 2007.

[11] In the fall of 2009 Mr. McKenney was hospitalized in Yarmouth as a result of a possible stroke. His health deteriorated through October 2009. Sonia Thompson came to Nova Scotia in late October and spent time in the hospital with her father. Prior to his release from the hospital, Sonia Thompson returned home to Alberta. On December 4, 2009 Mr. McKenney passed away. This application is about his testamentary intentions and whether a 2009 "note" supercedes a 2003 Last Will and Testament.

THE 2003 WILL:

[12] The parties agree that Mr. McKenney's 2003 Will should be accepted as a valid Will. The only issue between the parties is whether a 2009 document displaces the 2003 Will. In the 2003 Will Mr. McKenney appointed Warren Harris as his executor. He distributed his assets as follows:

> To Dwayne McKenney I leave my property in Roseway, Shelburne County, N.S. which was left to me in my mothers Will. To Kendall McKenney I leave the sum of one Canadian dollar. To Sonia _____________I leave the sum of one Canadian dollar. To Warren Harris Jr. I leave my properties in Port L'Hebert, all my assets and monies. Access to these properties was given to Donald McKenney by Janet Wolfe and now by her son Ronald Wolfe.

This Will was executed on December 13, 2003 and was witnessed by Laurine and Sidney Robertson.

[13] The evidence surrounding the making of this Will came from Warren Harris. He testified that after the trip to Texas, and Mr. McKenney's release from hospital, he brought a blank Will form to the Harris' home. Mr. McKenney requested that they help him with his Will. Mr. Harris testified that he asked for nothing from Mr. McKenney and did not direct him on what bequests to make. Mr. Harris also

testified that during Mr. McKenney's 2009 hospitalization, he inquired whether he wanted any changes to his Will and received a negative response.

[14] On cross-examination Mr. Harris testified that he wrote the Will for Mr. McKenney. He stated that Sonia's last name was not inserted because Mr. McKenney did not know how she spelled her surname. Mr. Harris stated that after the 2003 Will was executed, Mr. McKenney took it with him. Mr. Harris further testified that he found the 2003 Will in Mr. McKenney's home after his death. Mr. Harris also testified that on December 13th, 2003 he had no concerns about Mr. McKenney's competency.

[15] Mr. Harris testified that after Mr. McKenney's death, he provided a copy of the 2003 Will to Sonia Thompson. He stated that after she read it, she was obviously very upset. She then stated that the Will represented "another slap in the face" from her father. I accept Mr. Harris' testimony as truthful and an accurate depiction of the circumstances surrounding the 2003 Will.

THE 2009 DOCUMENT:

[16] The evidence surrounding the making of this document on October 31, 2009 came from Sonia Thompson and the Yarmouth Hospital medical records. Ms. Thompson testified that in September 2009 she heard that her father was sick and in hospital. She stated that after speaking with her father, she decided to come to Nova Scotia to be with him. She arrived in Shelburne on October 22, 2009. Sonia Thompson stated that she spent 10/12 hours a day with Mr. McKenney at the hospital.

[17] On October 31, 2009, Ms. Thompson was preparing to return to Alberta as she felt her father was improving. She testified she was not aware of the 2003 Will and stated to him "you should have a Will." She testified that her father indicated he agreed. It was Sonia Thompson's evidence that her father "appeared to understand" as he sat up in his hospital bed.

[18] Ms. Thompson testified that she told her father that she could put something in writing for him. She further testified that she told him that she had no desire to benefit from his estate because she did not need it. She reports that her father then

told her to write something up and to take his assets and do what you want with them. She then wrote the following document:

> I Don McKenney hereby leave all my worldly possessions to my daughter, Sonia Thompson. This includes my cottage in Port L'Hebert and my 2007 Dodge Ram Truck.
>
> October 31, 2009

Donald McKenney then attached his name to that piece of paper. Ms. Thompson testified that "it looked like" Mr. McKenney read the document before he attached his signature. Ms. Thompson testified that she took the document back to Alberta later that date. There were no other persons in the hospital room when the document was created.

[19] Ms. Thompson learned about the 2003 Will shortly after Mr. McKenney's death. She was very hurt by the one dollar bequest to she and her brother Kendall. She was so upset she did not attend her father's funeral. She testified she was angry at Warren Harris. She returned to Alberta and later started this litigation.

[20] Sonia Thompson firmly refutes any suggestion her father was not competent when he signed the October 31, 2009 document. She further refutes any suggestion she exerted any influence on her father to agree to and sign that document.

[21] On cross-examination Ms. Thompson acknowledged that on October 31, 2009 she did not ask her father if he had a Will. She agreed she wrote and dated the 2009 document. She admits the words are her words and not her fathers words. Ms. Thompson acknowledges her father did not mention the truck or the cottage and never suggested leaving Kendall something. In response Ms. Thompson stated “I knew what his assets were.”

THE WILLS ACT:

[22] Section 6 of the **Wills Act** provides as follows:

> 6(1) No will is valid unless it is in writing and executed in manner hereinafter mentioned:
>
> (a) it shall be signed at the end or foot thereof by the testator or by some other person in the testator’s presence and by the testator’s direction;

> (b) such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
>
> (c) such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation is necessary.
>
> (2) Notwithstanding subsection (1), a will is valid if it is wholly in the testator's own handwriting and it is signed by the testator.

Obviously the 2009 document does not comply with this section for a variety of reasons.

[23] Section 8A of the **Wills Act** provides as follows:

> 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.

Clearly this section represents the only avenue to having the 2009 document termed a valid testamentary disposition.

[24] The Supreme Court of Nova Scotia reviewed section 8A of the **Wills Act** in *Robitaille v. Robitaille Estate*, 2011 NSSC 203. This case dealt with revisions that were made to the testators will upon instructions to a lawyer, which revisions were not executed in accordance of section 6 of the **Wills Act**. LeBlanc, J. states in paragraph 27 as follows:

> [27] In order to order that a writing is valid and effective, I must be satisfied that the testator's revised will represents a deliberate or fixed and final expression of her intention to dispose of her property on death. In my view, the circumstances of this case support the conclusion that the revised will does meet this test, and that the writing should be enforced as a valid and effective will even though it was not properly witnessed.

Justice LeBlanc applied the same test as the Manitoba Court of Appeal in *George v. Daily* (1997), 115 Man. R. (2d) 27:

> The term "testamentary intention" means much more than a person's expression of how he would like his/her property be disposed of after death. The essential quality of the term is that there must be a deliberate or fixed and final expression of intention as to the disposal of his/her property on death.

[25] The Supreme Court of Nova Scotia also reviewed section 8A of the **Wills Act** in *Komonen v. Fong*, 2010 NSSC 315. The facts are not critical to the employment of this authority. Associate Chief Justice Smith referred to Justice LeBlanc's decision and was satisfied he applied the correct test. At paragraph 21 she set out the conclusions of Philip J.A. in *George v. Daily, supra*:

> [21] In George v. Daily, supra, Philip, J.A. reviewed in detail the history and purpose of s.23 of the Manitoba Wills Act, which is substantially similar to s.8A of the Nova Scotia Act. In arriving at his conclusions, he stated at ¶ 59-61:
>
>> [59] It remains a fundamental and universal proposition 'that nothing can receive probate which was not intended to be a testamentary act by the testator': per Lord Selborne, L.C. in **White v. Pollock (1882), 7 App.Cas. 400, at p. 405.** In Bailey, S.J., **The Law of Wills** (th Ed. 1973, Pitman Publishing), the principle is stated (at pp.65-66): "No will is entitled to probate unless the testator executed it with the intention that it should take effect as his will.' (It is not necessary to review cases such as **Milnes v. Foden (1890), 15 P. 105**, in which instruments have been admitted to probate even though the deceased was unaware that he/she had performed a testamentary act. The principle remains the same: the intention that the instrument record the final (but revocable) wishes of the deceased as to the disposal of his/her property after death).
>>
>> [60] Section 23 can be invoked to give effect to the testamentary intentions of a deceased in the face of imperfect compliance, even non-compliance, with the formalities of the Act. Section 23 cannot, however, make a will out of a document which was never intended by the deceased to have testamentary effect. In **Balfour Estate, Re (1990), 85 Sask. R. 183 (Q.B.)**, Gerein, J., explained the principle:

> "Yet, it must be kept in mind that the section's [2.35.1 of the Saskatchewan Wills Act] purpose is to overcome non-compliance with formal requirements. It does not empower the court to render a document testamentary in nature when it is otherwise not so. In the instant case, the document does not manifest a true testamentary intention and therefore does not meet the threshold requirement of the section."

> [61] Not every expression made by a person, whether made orally or in writing, respecting the disposition of his/her property on death embodies his/her testamentary intentions. The law reports are filled with cases in which probate of holographic instruments has been refused because they did not show a present intention to dispose of property on death. **Gray Estate, Re, [1958] S.C.R. 392**, was such a case.

This is the test I will apply in this case.

<u>DONALD MCKENNEY'S TESTAMENTARY CAPACITY:</u>

[26] The test for testamentary capacity is well established. Reference is made to Feeney's Canadian Law of Wills (4th edition) at page 2.6:

> TO use the time-honoured phrase, a person must be "of sound mind, memory and understanding" to be able to make a valid will. When a will is contested on the ground of mental incapacity, the propounder must prove that the testator understood what he or she was doing: that the testator understood the "nature and quality of the act." The testator must be able to comprehend and recollect what property he or she possessed, the persons that ordinarily might be expected to benefit, the extent of what is being given to each beneficiary and, finally, the nature of the claims of others who are being excluded.

This case is all about testamentary capacity.

[27] The test for proof in solemn form was addressed in *Fennell v. Crookshank Estate*, 2010 NSSC 442 at paragraphs 11-13:

> [11] In order to have a will proven in the solemn form, the court must be satisfied of three requirements, which were set out by the Supreme Court of Canada in Vout v. Hay, 1995 CanLII 105 (S.C.C.), [1995] 2 S.C.R. 876, and applied by this Court in Re Willis Estate, 2009 NSSC 231 (CanLII), 2009 NSSC 231, 2009 CarsellNS 426. First, the formalities of execution required pursuant to the Wills Act, R.S.N.S. 1989, c.505, must be satisfied and the testator must have known and approved the contents of the will. The onus of proving these requirements rest with the applicant ... I am satisfied that in this instance, all of the requirements of section 6 of the Wills Act are satisfied. The will is in writing and it is signed by the testator and by two witnesses (in the testator's presence), and the witnesses have provided affidavits. Once it is shown that the will was duly executed with the required formality, a rebuttable presumption arises that the testator knew and approved of the contents of the will.
>
> [12] The second requirement is that the applicant must show that the testator possessed the required capacity to create and understand the will when it was executed. However, proof of proper execution also raises a rebuttable presumption that the testator had the required capacity when the will was executed.
>
> [13] Finally, if it is shown that undue influence was applied to the testator, the will will not be admitted to probate. The burden of proof rests on the party attacking the will to show that the testator's assent was obtained by undue influence, such that the will is a product of coercion rather than of the testator's wishes.

[28] I am satisfied that the 2009 document could comply with s.8A of the **Wills Act**. However, I am not satisfied that it represents "a deliberate or fixed final expression" of Mr. McKenney's intention to dispose of his property. I am not satisfied he understood that he was preparing a will or that he knew what he was passing to Sonia Thompson. After all, Ms. Thompson testified her father said nothing about his money, his truck or his real property. It is an understatement to suggest that the 2009 document was not created in "suspicious circumstances."

[29] Donald McKenney's 2009 medical records clearly put his mental capacity into question. He was a patient at the Yarmouth Hospital from September 29 to November 10, 2009. He was admitted as a result of a suspected stroke. Warren Harris testified to finding him sitting in his truck in a semi-conscious state in late September. These records disclose that Mr. McKenney was extremely sick during his hospital stay. He required intubation, several medications and was prone to severe nosebleeds. He spent most of his days in bed and was reluctant to participate in physio or occupational therapy.

[30] The "progress notes" for October 27, 2009 state as follows:

> Pt appeared alert. Pt often required instructions to be repeated or broken down. PT had difficulty with multi-step instructions ... Pt had difficulty in all areas of the MOCA and scored a 14/30. Pt is having cognitive difficulties ... writer explained pt's brain needs time to heal.

On October 18, 2009 Mr. McKenney's physical ailments required an admission to the intensive care unit.

[31] The notes for October 26, 2009 state as follows:

> Pt not appropriate to mobilize at this time, pt in and out of sleep, pleasantly confused ...

[32] The notes for October 28, 2009 state as follows:

> Physio note - pt much more aware today than previous day. Still pleasantly confused. Was able to follow instructions better today ... pt currently on cardiac dig soft diet. Pt confused. Pt appears confused, denying SOB or cough.

[33] The notes for November 2, 2009 state as follows:

> <u>Occupational Therapy</u>: Follow-up with pt today. Pt lying down with eyes closed but able to answer visitors questions ... pt being unpredictable (tried to jog) pt ++ confused.

[34] The notes for November 4, 2009 state as follows:

> Psych Assessment: Appears competent - otherwise well
>
> Pt finished bathing and dressing and walked out of the bathroom without his pants on. He required prompting before taking note of same. Again it was unclear if pt did this intentionally or not. Pt also spoke of being in hospital for the last 4 months, starting in Texas and in other areas of the USA. He stated he had a fall b/c of 'horse pills' that were given to him by a doctor and this is what brought him into hospital, and that his daughter had also brought the extended hospital stay on - writer unclear again on the accuracy of this information.

The totality of the evidence establishes this information was not accurate. I find that this information was a product of Mr. McKenney's failing cognitive skills.

[35] Also on November 4, 2009 appears the following:

> Pt stated that he did not have a bath in 4 months and could not believe there were no bathtubs in the hospital, yet nurse reported that he was given a full bath by nursing staff last night.

These medical notes also indicate morphine was provided to Mr. McKenney in the days preceding October 31, 2009.

[36] The Nurses Progress Notes were tendered in evidence. The notes for October 25, 2009 state as follows:

> Daughter called staff to room. Pt eyes open trying to talk. Unable to find words when talking ... talking having trouble finding words - daughter present.
>
> Awake, unaware of place or time
>
> At 6:55pm completed assessment done. Alert, cannot state where he is, but will agree [when] told where [he] is.

[37] The nurses notes for October 26, 2009 state as follows:

> Can carry on a conversation although does not always make sense ... laughs inappropriately, easily distracted.
>
> Complete assessment done. Confused but pleasant. Follows all commands, although thinks he is at home, needs to go to Barrington. Does not think he is in hospital. Smiles and laughs.

[38] The nurses notes for October 27, 2009 state as follows:

> Pt confused, thought he was in Minneapolis. Unable to give IV antibiotics because pt pulls out IV's.
>
> Remains confused, believes he was in Yellowknife 3 days ago ... also believes he is in Shelburne not Yarmouth hospital.

[39] The notes for October 28, 2009 state as follows:

> Pt found half out of bed with leg over the railing. Inc lg bm, depends ripped off and stool over bed linen.

> Pt has been confused most of nite. Not oriented to time or place ... stating he is at the ‘navy base’ ...

[40] The notes for October 29, 2009 state as follows:

> Pt disoriented to place and time. When asked where he was, pt stated Sable River.

[41] The notes for October 30, 2009 state as follows:

> Pt alert however confused to time and place ... confused believes he is in Shelburne hospital and not Yarmouth. Does not realize he is in hospital.

[42] The above examples from the hospital records satisfy me that Mr. McKenney did not possess sufficient competency such that I could conclude the 2009 document was a valid will. It was written by the beneficiary and there were no witnesses. I find that the 2009 document is not saved by s. 8A of the **Wills Act**. It does not represent the testamentary intentions of Donald McKenney.

CONCLUSIONS:

[43] I find that the 2009 document is not a will in that it does not represent Mr. McKenney's intentions. I conclude that the December 13, 2003 will represents his true testamentary intentions. Warren Harris came to the assistance of Mr. McKenney when his children were estranged from him. Warren Harris cared for him when no one else was available. He provided this care without compensation because he was one of Mr. McKenney's only friends. This was not forgotten and their reward was his meagre estate.

J.