SUPREME COURT OF NOVA SCOTIA
Citation: *Raczkowski-Filliter v. Raczkowski*, 2019 NSSC 165

Date: 20190604
Docket: Hfx No. 482251
Registry: Halifax

Between:

Yvonne Raczkowski-Filliter

Plaintiff

v.

Richard Raczkowski

Defendant

J U R I S D I C T I O N D E C I S I O N

Judge: The Honourable Justice M. Heather Robertson

Heard: May 13, 2019, in Halifax, Nova Scotia

Written Decision: June 4, 2019

Counsel: Richard W. Norman, for the plaintiff
Peter C. Rumscheidt, for the defendant

Robertson, J.:

[1] The defendant, Richard Raczkowski brings this motion requesting the court decline to exercise its jurisdiction to hear this matter and declare that Ontario is clearly the more appropriate forum.

[2] The matter concerns change in beneficiary designation and estate planning issues upon the death of the parties' mother Elsie Megan Raczkowski ("Mrs. Raczkowski") who died November 2, 2018. Disagreements arose between her only two children, her daughter, Yvonne Raczkoswki-Filliter ("Yvonne"), the plaintiff, and her son, Richard Raczkowski ("Richard"), the defendant, giving rise to proceedings initiated both in Ontario and Nova Scotia.

Background

[3] The deceased mother of the parties made a will dated June 27, 2011, which named the parties (her two children) as the executors of her estate and after specific bequests divided her estate between them. On May 16, 2014, Mrs. Raczkowski made another will, again appointing her two children, Yvonne and Richard, as co-executors, made bequests to her five grandchildren and divided the residue of her estate between her two children, Yvonne and Richard. This will does differ from the will made in 2011. Both of these wills were drafted by and executed before lawyers in Whitby, Ontario who had previously handled Mrs. Raczkowski's legal work. The first will of 2011 was executed while Mrs. Raczkowski was still resident of Ontario. The second will of 2014 was executed while Mrs. Raczkowski was visiting her son, Richard, in Ontario for one week in May 2014. Yvonne says she was unaware of the existence of this will until 10 days following her mother's death.

[4] Mr. Raczkowski, the father of Yvonne and Richard, died in 2014, three years after he and his wife had both made their wills in 2011.

[5] Mrs. Raczkowski had lived in Whitby, Ontario, from 1954 when they first came to Canada, until 2012. Mrs. Raczkowski became a permanent resident of Nova Scotia, moving here to live with her daughter in July 2012 as she could no longer safely live alone. Mr. Raczkowski died in 2014 in Ontario. He had been living in a nursing home near Whitby, suffering from advanced dementia for several years.

[6] Upon becoming a resident of Nova Scotia in 2012 Yvonne summarized her mother's activities upon arriving, saying that Mrs. Raczkowski:

- applied for and received a Nova Scotia MSI card in 2012;
- applied for the continuing care program and was accepted as a Nova Scotia resident on May 10, 2013;
- changed her address with her financial advisor on all her CIBC accounts to Dartmouth, Nova Scotia in October 2013;
- sold her Ontario house in 2013;
- visited Ontario for the last time in May 2014 after her husband's death (after that time she never again visited Ontario or asked to visit Ontario);
- received all mail for her financial accounts at her home in Nova Scotia;
- banked at a CIBC Portland Street branch;
- held a Simplii (formerly President's Choice) account at Portland St.;
- retained an accountant in Halifax;
- listed her Nova Scotia address on her taxes for the last six years of her life;
- changed the addresses on her cheques to her Nova Scotia address;
- became a patient of a number of local physicians and a dentist;
- moved her personal possessions to her Nova Scotia home.

[7] However, Mrs. Raczkowski had retained her financial advisor, Knar Basmadjian, in Toronto where some of her investments remained as Ms. Basmadjian was a trusted advisor and friend.

[8] In Nova Scotia, Mrs. Raczkowski continued to live with her daughter and son-in-law, Dr. Bruce Filliter, until six months before her death in November 2018, when she became resident of a nursing home, the Sagewood, located in Lower Sackville, Nova Scotia and died there.

[9] After her death, Yvonne says she became aware of the "secret" will of 2014 and "had concerns about transactions in my mother's accounts" that were a transfer of various funds to her son, Richard.

[10] She also became concerned about the August 2018 changed beneficiary designations on her mother's TFSA and RIF accounts which designated her brother, Richard, as sole beneficiary – not, as previously, designating both of them her joint beneficiaries.

[11] Yvonne questioned her mother's capacity to make these changes, as she was then a cancer patient, frail and depressed and living at Sagewood. She had previously been assessed in 2017 by Dr. Daniel J. Carver, as suffering from mild dementia and Alzheimer's disease. A written note by Dr. Leah Nemiroff, his assistant at the time of the report, recorded Dr. Carver's diagnosis as "mild to moderate dementia" recommending the new medication Aricept and the involvement of the family in Mrs. Raczkowski's finances to help prevent problems in the future as the dementia progressed.

[12] Following her death, the parties began proceedings in both Nova Scotia and Ontario.

[13] Richard commenced a proceeding in the Ontario Superior Court of Justice in late February 2019. He is represented in that proceeding by Lionel Tupman ("Mr. Tupman"). In that proceeding various forms of relief are sought. They include:

> A. An order requiring Ms. Raczkowski-Filliter to either refuse or accept appointment as Co-Estate Trustee with respect to the 2014 Will;
>
> B. An Order that the May 2014 Will be Proven in Solemn Form; and
>
> C. A declaration that the CIBC beneficiary designations made in August 2018 are valid.

[14] It is contemplated that all issues would be resolved at one trial in the Superior Court of Justice in Ontario.

[15] Yvonne commenced proceedings in Nova Scotia, one week after her mother's death. They include two *ex parte* proceedings before the Supreme Court of Nova Scotia seeking injunctive relief in effect restraining any person from:

> a) selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with funds held in CIBC Account No. 55310284 (RRIF) and CIBC Account No. 69034211 (TFSA) (the "Accounts") belonging to the late Elsie Raczkowski, wherever these funds may be located;
>
> b) instructing, requesting, counselling, demanding, or encouraging anyone else to do so.

[16] These orders were dated May 15, 2018 and December 18, 2018. The second order was issued by consent.

[17] On January 31, 2019, a Probate Court order signed by Justice John Bodurtha authorized Yvonne to obtain financial records from third parties with respect to her mother's assets.

[18] On March 8, 2019, Yvonne sought and received an order directing the lawyers who drafted and witnessed the wills of 2011 and 2014 to disclose their respective files regarding the estate advice given and received by her mother.

[19] As to future proceedings, Richard expects a single trial in Ontario. He points out that proceedings in Nova Scotia could occur before two courts, the Supreme Court and the Probate Court. Obviously, a judge of the Supreme Court in Nova Scotia would sit hearing all matters if the files were consolidated in one proceeding, in my view a likely occurrence, as already proposed by Yvonne.

[20] The issues are as follows:

> Should the Nova Scotia Supreme Court accept jurisdiction to hear this matter or should it determine that it would be appropriate for the proceeding to be adjudicated upon in the Ontario Court?
>
> To determine the issue, the court must apply the provision of the *Court Jurisdiction and Proceedings Transfer Act*, SNS c. 2 as amended ("*CJPTA*").

[21] Section 4 of the *CJPTA* provides:

> Proceedings against persons
>
> 4 A court has territorial competence in a proceeding that is brought against a person only if
>
> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counter-claim;
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction;
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;
>
> (d) that person is ordinarily resident in the Province at the time of the commencement of the proceeding; or
>
> (e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based. *2003 (2nd Sess.), c. 2, s. 4.*

[22] In the circumstances of this case s. 4(e) applies in that the deceased, Mrs. Raczkowski, was resident in Nova Scotia from 2012 until her death in November 2018, received medical treatment here, enjoyed the assistance of care providers here and did her CIBC banking here, but for maintaining some assets in Ontario looked after by her long time financial advisor Knar Basmadjian with CIBC in Toronto.

[23] In argument before the court, Richard's counsel has agreed that his client concedes that because Mrs. Raczkowski was ordinarily resident in Nova Scotia, there is a real and substantial connection to Nova Scotia and therefore they also concede that Nova Scotia courts have territorial competence.

[24] As described by Wright, J. in *Penny (Litigation Guardian of) v. Bouch*, 2008 NSSC 378, the *CJPTA* adopts a two-step common law analysis for determining whether the court should assume jurisdiction over an originating court process brought against a non-resident defendant:

> [20] The Act clearly recognizes and affirms the two step analysis required to be engaged in whenever there is an issue over assumed jurisdiction, which arises where a non-resident defendant is served with an originating court process out of the territorial jurisdiction of the court pursuant to its Civil Procedure Rules. That is to say, in order to assume jurisdiction, the court must first determine whether it can assume jurisdiction, given the relationship among the subject matter of the case, the parties and the forum. If that legal test is met, the court must then consider the discretionary doctrine of *forum non conveniens*, which recognizes that there may be more than one forum capable of assuming jurisdiction. The court may then decline to exercise its jurisdiction on the ground that there is another more appropriate forum to entertain the action.

[25] Having conceded the jurisdiction of the courts in Nova Scotia to hear the matter, Richard has argued the second part of the test asking the court to decline its jurisdiction as Ontario is the more appropriate forum to deal with the claim regarding the validity of the beneficiary designation for the TFSA and RRIF accounts made by his mother in August.

[26] This analysis engages s. 12(2) of the *CJPTA*:

> (2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;

> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole. *2003 (2nd Sess.), c. 2, s. 12.*

[27] In his application, Richard relies on *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 at para. 30, where McLachlin, C.J. endorsed a "holistic approach" to the stage two "*forum non conveniens"* analysis, requiring consideration of all the factors, arguments and the totality of evidence.

[28] Richard also acknowledges he has the burden of proof in this motion, citing *Club Resorts Ltd. v. Van Breda*, 2012, SCC 17, Justice Lebel at paras. 108 and 109:

> 108 Regarding the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*. On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, [page626] which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. Nor is this expression found in art. 3135 of the *Civil Code of Québec*, which refers instead to the exceptional nature of the power conferred on a Quebec authority to decline jurisdiction: "... it may exceptionally and on an application by a party, decline jurisdiction ...".
>
> 109 The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus

> ensuring fairness to the parties and a more efficient process for resolving their dispute.

[29] Richard in his brief relies on the following factors in support of his position that this matter should be deal with by the Ontario Court:

> A. The most important witnesses with respect to the validity of the beneficiary designation (the CIBC personnel with whom Ms. Raczkowski directly dealt) are all in Ontario;
>
> B. Mr. Raczkowski himself resides in Ontario;
>
> C. Ms. Raczkowski-Filliter has indicated she may challenge the validity of the 2014 Will. Her grounds for such a challenge could include the capacity of Ms. Raczkowski. If such a proceeding was initiated in Nova Scotia, the issue of Ms. Raczkowski's capacity would be the subject matter of multiple proceedings. If the litigation regarding Ms. Raczkoswki's capacity occurred in Ontario, that litigation as well at the beneficiary designation litigation could be adjudicated upon by one Judge on one proceeding. On the other hand the issues would need to be dealt with independently in the Nova Scotia courts with the matters regarding the validity of the Will being dealt with in Probate Court and the issue of the validity of the beneficiary designation being dealt with in Supreme Court. This would be an unnecessary burden on the resources of the Nova Scotia judicial system. It raises the potential of conflicting findings of fact in multiple proceedings. It would put my client to the expense of dealing with two separate proceedings.
>
> D. The funds which are the subject matter of the dispute are located in Ontario.
>
> E. If there were to be a challenge to the validity of the 2014 Will, the lawyer who drafted the Will, Mark Woitzik would be a key witness. He is in Ontario. This reinforces the benefit of any disputed proceedings occurring in Ontario where all mattes would be deal with at the same time by the same Judge. This is the objective of the Ontario proceedings that my client has initiated.

[30] I have before me the affidavit evidence of Richard, who was cross-examined on the contents of his affidavit via a video link in the court. Yvonne was present in the court and also cross-examined on the contents of her affidavit. Each outlined the factual basis for their respective positions on which jurisdiction was most appropriate.

[31] Yvonne reminded the court that the onus rests with Richard and that they must show that Ontario is a clearly more appropriate forum to hear the matter, and that this court is not hearing the issue on its merits. *Wamboldt Estate v. Wamboldt*, 2017 NSSC 288:

> [31] Also, I must consider that the estate has chosen the forum and the standard to displace the plaintiff's chosen jurisdiction is high (*Young v. Tyco International of Canada Ltd*., 2008 ONCA 709, para. 28). I am mindful that I am not determining the merits of the case.

[32] Yvonne also argues that the place of Mrs. Raczkowski's last domicile will govern the administration of her estate, i.e., the laws of Nova Scotia.

[33] As to convenience and expense favouring one jurisdiction over the other, it is clear that Richard wants the matter litigated in Ontario where he resides with his wife and now two of his three children. Witnesses from CIBC would be called, but the principal witness would be Knar Basmadjian with respect to her dealings with Mrs. Raczkowski respecting change of beneficiary on her investment accounts. As this involves an examination of her capacity in 2018, a significant number of Nova Scotian witnesses would be able to speak to her situation. These include her physicians Dr. Petropolis, Dr. Lee, Dr. Carver and Dr. Michael Flynn, the latter two having been involved in her cognitive assessment. There are also health care providers who attended Mrs. Raczkowski in the last year of her life who could attest to her competency. Yvonne, her husband, Dr. Bruce Filliter, her adult children, Dr. Jillian Filliter and Daniel would also be witnesses.

[34] Applying the consideration of s.12(2) of the *CJPTA*, s. 12(2)(a) heavily favours Yvonne. By far, a greater number of witnesses required in the proceeding will be from Nova Scotia and will be able to comment on Mrs. Raczkowski's state of health and mental capacity while resident in this province.

[35] While some of Mrs. Raczkowski's accounts were located in Ontario, they were administered by her with respect to her assets in Nova Scotia. Therefore, I consider this point a neutral factor.

[36] The relevant laws of Nova Scotia are essentially the same as those in Ontario respecting this issue, but because Nova Scotia was Mrs. Raczkowski's last domicile, Nova Scotia is thus favoured.

[37] I do not believe a multiplicity of actions would result in Nova Scotia because a consolidation of proceedings before one Supreme Court Judge in Nova Scotia would be the reality.

[38] Enforcement of any judgment would not be an issue for consideration. Nor would the fair and efficient working of the Canadian legal system be compromised by this proceeding.

[39] While Yvonne has not yet made a decision to challenge her mother's 2014 will, I do agree that the principal witnesses to such a challenge would be the Ontario lawyer who took her instructions during her one week visit there, but her domicile remained that of Nova Scotia.

[40] After considering all the factors of s. 12(2) *CJPTA*, I find that Richard has not shown that Ontario is clearly the more appropriate forum to hear this action. The balance of convenience and expense clearly weighs in favour of the courts of Nova Scotia hearing the matter.

[41] If the parties are unable to agree on costs, I will receive written submissions.

Justice M. Heather Robertson