IN THE SUPREME COURT OF NOVA SCOTIA
Citation: MacNeil Estate, Re, 2003 NSSC 50

Date: 20021230
Docket: 188292
Registry: Truro

Between:

IN THE MATTER OF the Estate of John Forward MacNeil

- and -

IN THE MATTER OF certain real property situate at Civic Number 1835 West Branch Road, Welsford, Pictou County

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DECISION

Judge: The Honourable Justice J. E. Scanlan

Heard: (December 30, 2002) in Truro, Nova Scotia

Oral Decision: December 30, 2002

Written Decision: March 3, 2003

Counsel: Mr. Michael Stokoe, for the Applicant
Mr. Hector MacIsaac, for the Respondent

By the Court:

[1] In this application the applicant, Mr. Crittenden, asks the Court to make a declaration saying that a deed executed prior to the death of the late John Forward MacNeil in relation to real property at West Branch, Welsford, Pictou County, Nova Scotia is a valid deed. Mr. John Forward MacNeil instructed his solicitor not to record it or give it to anyone.

BACKGROUND

[2] John Forward MacNeil and Jean Holmes owned the property which is now the subject of this application. Ms. Holmes died on March 12, 2002 or thereabouts.

[3] The applicant, Mr. Crittenden, was a friend of Ms. Holmes and Mr. MacNeil for some time. For approximately ten years prior to Mr. MacNeil's death he would come to Nova Scotia periodically, perhaps a week or two per year. Mr. Crittenden would also call periodically as well, perhaps as often as every two weeks. He would talk with Mr. MacNeil or Ms. Holmes. That

friendship continued over a period of many years. Mr. Crittenden described it as a father/son relationship and I have not heard any other descriptions.

FACTS SURROUNDING THE EXECUTION OF THE DEED

[4] As I have indicated already, Ms. Holmes died on March 12, 2002. On July 24th, after Mr. Crittenden had been in Nova Scotia for approximately one week, staying with Mr. John Forward MacNeil, Mr. Crittenden and Mr. John Forward MacNeil attended at the law offices of Ian MacLean in Pictou, Nova Scotia and gave instructions for preparation of a deed. Mr. MacLean had some concerns at the time but undertook to prepare a deed. The deed was signed on August 7, 2002. Unfortunately, Mr. John Forward MacNeil passed away soon thereafter having died on September 7, 2002.

[5] There is an affidavit before the Court, filed by Evelyn Laurena Turner. That affidavit went unchallenged by way of cross-examination and by way of evidence. She described Mr. John Forward MacNeil as having been a very severe alcoholic for many, many years. He had not consumed alcohol for many years prior to his death but she indicates that for a number of months prior to September 7, 2002, he had in fact been again consuming alcohol. She talked of the fact that Jean Holmes and Mr. John Forward

MacNeil had indicated during their lifetime that they wished the property go to her and not to Mr. Crittenden. In fact she referred at paragraph 14, 15 and 16 of her affidavit to Mr. John Forward MacNeil wanting her and her husband to move to Pictou County. She said this discussion occurred on many occasions when Mr. John Forward MacNeil was drunk. She said that neither she nor her husband, James MacKinnon, would go along with those proposals and that they would not move to Pictou County. She said that moving to Pictou County was a precondition Mr. John Forward MacNeil would state as being a requirement for him to convey the property to her.

[6] I indicated to Mr. Stokoe during submissions that I was not going to ask him to deal with the issue of undue influence or capacity. I said that because I do not think this case turns on those two issues. I am satisfied the case turns on the issue of intention of Mr. John Forward MacNeil as to the issue of delivery and/or conveyance of the property.

[7] Mr. John Forward MacNeil lived a somewhat solitary existence. There is reference to his biological daughter, Ms. Turner, as having been adopted. She renewed the relationship she had with Mr. John Forward MacNeil when she became aware that he was her natural father. That is indicated in the affidavit and he was certainly aware as to who she was and where she was.

In fact, even Mr. Crittenden accompanied Mr. John Forward MacNeil to visit at the home of Ms. Turner.

[8] It is not clear as to what Mr. John Forward MacNeil had in mind in terms of his precise reasoning or the reasoning process he went through in making the decision to have the deed prepared and later signed. There was reference in the affidavit of Mr. Crittenden and also the affidavit of Elma Clara MacLeod which gives some possible explanation for it. Mr. Crittenden's affidavit is inconsistent with the affidavit of Ms. Turner wherein she has discussed what Mr. John Forward MacNeil and Ms. Holmes said to her in terms of what their intention was. There would be, I suppose, mixed reasoning and mixed emotions in terms of conveyance of the property and perhaps who it should be conveyed to.

[9] As I indicated on July 24, 2002, Mr. Crittenden accompanied the deceased, Mr. John Forward MacNeil, to the offices of Mr. MacLean for the purposes of having a deed prepared conveying the disputed lands to Mr. Crittenden. Mr. MacLean was concerned about the situation. His decision to delay the preparation of the deed was an attempt to ensure that the now deceased grantor was not being unduly influenced by the grantee. I again note that Mr. Crittenden had accompanied this elderly gentlemen to Mr. MacLean's

office. It was only during the second meeting when Mr. Crittenden was not there that Mr. MacLean says that he took care to explain the legal consequences of the deed. Mr. MacLean was of the view that even though the deed was signed there was no delivery and therefore the conveyance was not effected although there is no evidence that he specifically gave that advice to Mr. John Forward MacNeil during this second meeting. During the second meeting when the deed was signed Mr. MacLean was specifically instructed not to record the deed nor to give it to anyone until he, Mr. John Forward MacNeil, was ready.

[10] I refer to the affidavit of Mr. MacLean, specifically paragraph 11, and his notes which are included in his affidavit say in part:

> I met alone with John. He came in alone.
>
> I asked him to consider carefully if he wants to put Crittenden's name on deed. Says he has an adopted son in Sudbury, Ontario. Never saw since five years old, two daughters, Glace Bay, Fredericton. Very little contact with them. Says that he and Crittenden are very good friends and have been for years.

That passage offers a possible explanation as to why Mr. Crittenden was being considered as a grantee on the deed. I am satisfied that the next passage in Mr.

MacLean's notes are crucial as regards Mr. John Forward MacNeil's intentions at the time of the execution of the deed.

> Says he wants to sign deed. I explained effect. He will sign but says don't do anything with it until he is "ready". I asked him what means ie. don't record or give to anyone. He says: questioned why not? He refused to say. I questioned when do I release? And he only said he would tell me when ready. I am to wait to hear from him.

I have already noted that Mr. MacLean was of the opinion after Mr. John Forward MacNeil passed on that, even though the deed was signed the property was not conveyed without delivery of the deed.

[11] Mr. Crittenden now relies on a line of cases which says that a deed can be signed and sealed and delivered in accordance with the written words on the deed even without it being physically delivered. In some cases delivery has been said to have occurred even where the grantees do not know of the deed. I would also point out that Mr. MacLean was not here to give detailed explanation as to what he meant when he said:

> I explained effect

We did not have evidence that suggested Mr. MacLean said the deed would not be effective if it was to remain in his files. It is not for Mr. MacLean to decide here today as to whether or not the deed was valid. That is the issue now before the Court. I must decide it based on the evidence.

[12] The applicant relies substantially on the line of cases which includes the **Ross v. Lynds Estate** (1977) 28 NSR (2d) 260. That line of cases talks about delivery of the deed in fact occurring at the time of execution. I am satisfied however that the facts of this case distinguish it from the **Ross** case and the many other cases that were relied upon by the applicant. In the **Ross** case the deed was signed in front of counsel and when asked by counsel about recording the deed the grantor said she would record it herself. The grantor then put the deed in her purse and it was found in that same purse 20 months later when she died. In that case the grantor made it clear that it was her wish to have the property conveyed to her grandson and the deed fulfilled her stated wish. She made it clear that she would record the deed. In referring to **Zwicker v. Zwicker** (1899) 29 S.C.R. 527 the Court in the **Ross** case held that the efficiency of the deed depends on it being signed, sealed and delivered by the maker of it not on his (her) ceasing to retain possession of it. I accept, without hesitation, the proposition that delivery of

the deed can be effected and the deed binding before the deed comes into the custody of the grantor. As I noted earlier, and as explained in **Xenos v. Wickham** 36 L.J.C.P. 313, delivery can even occur before the grantee knows about the deed. The issue is to be determined by ascertaining the intent of the grantor based on the evidence. The deed will only be ineffective if there is clear evidence that the Grantor did not intend there to be delivery of the deed at the time of execution.

[13] I also refer to the **Deely Estate (Re)** [1995] O.J. No. 3189 where at paragraph 7, Justice McCart referred to the **Zwicker** case. He noted the requirement that the grantor have a present intention that the deed have an immediate effect. That intention, he said, may be inferred from the surrounding circumstances. In the **Deely** case the Court referred to the affidavits and accompanying letters and determined based on that evidence what the intention of the grantor was. There have been very few cases where the Courts have referred to the possibility of a deed being signed and sealed but not delivered.

[14] There have been cases where the Courts have acknowledged that a deed can be executed but not necessarily delivered. I reference **Thomas v. Thomas et al** [1939] 4 DLR 202 at page 206, where the Court noted:

> Thomas did not intend to create a nullity; there was no escrow. That leaves the delivery complete even though it was not made to the party who was to benefit by it.

There is no formal escrow in the present case in the sense that it was not delivered to a third party to be held pending completion of predetermined conditions for release. In the **Thomas** case the Court of Appeal said “there was no escrow.” In that sense I agree with the comments of Mr. Stokoe in that there is no evidence of specific pre-conditions for delivery and no evidence of a third party escrow arrangement in this case. In the usual escrow situation we normally see a deed is delivered to a third party on condition. Once the escrow conditions are met the third party is obliged to then release the deed. If the conditions are not met the deed is not released. I am satisfied that escrow situations are but one example of a case where a deed is executed and it is not intended that they be delivered immediately. I am satisfied that formal escrow is not the only situation in which the intention of the signatory to a document or a grantor in a deed does not intend immediate effect or delivery.

[15] I refer to **Edwards v. Porier** [1949] 1 DLR 846. The Court noted that very strong evidence is required in order to justify a Court in setting aside a deed which is valid on its face on the ground of non-delivery. This is such a case.

I am satisfied that there is indeed very strong evidence which would justify the Court in setting aside this deed. The instructions to Mr. MacLean not to record the deed or to release it to anyone is compelling evidence that the grantor did not intend to deliver the deed at the time of execution. It is not for the Court to speculate as to what caused Mr. John Forward MacNeil to delay the delivery of the deed. We have no idea what was going on in his mind in terms of his delaying; whether he wanted to have a chance to give it a second thought or whether he was reflecting on what he would be expecting from Mr. Crittenden. Like I say, it is not for the Court to speculate. There could be any number of possible explanations. One thing is clear, that is his instructions to Mr. MacLean. His instructions were, and I again refer to the notes of Mr. MacLean:

> he will sign but says don’t do anything with it until he is ready.

He said do not record it or give it to anyone. As I have indicated that is strong and compelling evidence that there was no intention to deliver the deed at the time it was executed. There is no indication that he changed his mind on the issue of delivery of the deed. This is not a situation as in the **Ross** case where he said, I am

going to record it myself or I'll look after it. It is not a situation where he gave the deed over to Mr. Crittenden and then asked for it back.

[16] I am satisfied based on the evidence and the surrounding circumstance in the present case that there was a lack of present intention to give effect to the instrument at the time of execution. I am not satisfied that there ever was an intention to deliver the deed and for that reason Mr. Crittenden's application must fail.

[17] By way of analogy I also compare delivery of a deed to the execution of a Will. This actually highlights the essential difference between the two instruments and the issue of why the delivery is of such great importance. When one executes a Will that Will can be changed or revoked on any given day so long as the testator still retains the testamentary capacity. There is no need for delivery. The legatees in a Will in many cases are not aware of the terms of a Will but cannot complain if the terms of a Will are changed even after proper execution of a Will. A deed is different. When it is signed, sealed and delivered it cannot be undone. I am satisfied that the evidence in this case clearly indicates that when Mr. John Forward MacNeil signed the deed he did not want to lose the right to rethink his decision. He said hold onto the deed, don't record it, don't give it to anybody until I let

you know. I do not have any evidence as to what Mr. MacLean explained to him when he explained the effect of Mr. John Forward MacNeil signing the deed. I again revisit the comments of Mr. MacLean after Mr. MacNeil died where he was of the opinion that there was no delivery and that the deed therefore had no effect.

[18] In this case the Court agrees with Mr. MacLean that there was no delivery and it was not intended by John Forward MacNeil that there be delivery on the day that he signed the deed. He left it with Mr. MacLean not to be released.

[19] From a lawyer's perspective it would throw the practice of law into chaos if this Court was to blindly enforce each and every document that was signed in a lawyer's office before the other side even knew about it or before it was delivered. That is especially true in a case such as this where there was a specific instruction not to release the document. I would suspect many clients indeed sign documents with instructions to their own lawyer not to release only to find out later that they want to revisit the issue. Those clients would be very surprised to find that, in spite of their instructions, they could not undo the effect of signing. Any number of scenarios could be envisaged whereby the practice of law would be thrown into chaos if I was to rule that

a document such as this or any other legal document, once signed, was deemed to be delivered. Delivery is a question of fact and intention to be determined in each and every case.

[20] I acknowledge that there are very few cases wherein the Courts have found as a matter of fact that the burden as set out in **Edwards v. Porier** has been met in terms of satisfying the Court that there was no intention to deliver at the time the document was executed. I am satisfied that this is such a case. The evidence clearly indicates to me there was no intention to deliver the deed at the time of execution.

[21] For purpose of classification again I point out that this case is not one decided based on the legal principles of escrow involving a third party. This was not a matter of conditions explained to Mr. MacLean that had to be met later. The case is decided based upon the intention of the intended grantor at the time of the execution.

[22] Mr. Crittenden's application is dismissed. I will not make a declaration declaring the deed valid and ordering it be recorded. The application is dismissed with costs.

[23] Counsel do you want to deal with the issue of costs?

[24] **MR. MACISSAC:** Possibly I could speak with Mr. Stokoe...if we can't agree on that My Lord...revisit it some other day.

[25] **THE COURT:** I hate to have somebody come all the way over here to spend two days getting costs for one day.

[26] **MR. MACISAAC:** Well...ahhh...well on that basis My Lord my...my client is...or Mr. Crittenden is not the only traveller here. My clients had attended on two separate occasions on this application. And...from the Sydney area...left this morning and the other morning at four o'clock. I would ask that costs...costs be awarded to flow...they flow in the cause and at the discretion of the trial judge and leave it at that.

[27] **THE COURT:** Good. Thank you. Mr. Stokoe.

[28] **MR. STOKOE:** Thank you My Lord. In reference to Mrs. Turner's being here, I should indicate to the Court that I indicated to Mr. MacIsaac that we would not require Mrs. Turner here for cross-examination. He said that he would bring her and possibly...up here...I think that part of the costs issue is irrelevant. It's clearly a question of ordinary costs in a chambers application.

[29] **THE COURT:** Thank you. I am satisfied costs should be fixed in the amount of $1,000.00 plus disbursements for Mr. MacIsaac's travel only, not

for his client, Ms. Turner's costs of travel. That is all inclusive counsel. Were there any disbursements other than your travel Mr. MacIsaac?

[30] **MR. MACISAAC:** I...I'd have to review with the office My Lord.

[31] **THE COURT:** If there are other...and I'm thinking about filing fees, those types of things, they will be added as disbursements.

J.

02/27/03