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Case Law Update – June 2009

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Radford v. Radford Estate

On September 2, 2008, Justice Quinn of the Ontario Superior Court of Justice rendered a decision in *Radford v. Radford Estate*.¹ Although the decision was one which dealt with an application seeking the removal and replacement of an estate trustee, and a motion for directions, the Court made the interesting point that “this case provides a good argument for leaving one’s testamentary estate to pets or strangers”.² Needless to say, the Court was completely frustrated by the actions of the deceased’s children and step-children in the proceedings.

Jafari v. Attar-Jafari

In *Jafari v. Attar-Jafari*,³ Justice Allen of the Ontario Superior Court of Justice considered a fundamental issue in the context of testamentary capacity litigation – that of “financial interest”. In this case, the applicant, the son of the deceased, brought an application pursuant to Rule 75.06(1) of the *Rules of Civil Procedure*. He sought an Order for Directions with respect to his challenge to the validity of his father’s will, which was executed on April 4, 2005. The father was survived by his wife of 40 years, four sons and a daughter. The father died on May 5, 2005, just over a month after executing his will and after suffering for four years with a brain tumour.

The Respondent, Alley Attar-Jafari (the “Respondent”), another son of the deceased, was named by the father in his will as estate trustee. Pursuant to the provisions of the will, the father had left his entire estate to his wife as sole beneficiary.

The Applicant argued that, due to the effects of a brain tumour on his father’s physical and cognitive abilities at the time the will was prepared and executed, the father lacked the requisite testamentary capacity to give instructions and to sign the will. The Applicant further asserted undue influence by the mother. However, in the course of the application, the Applicant did not present either expert medical or handwriting evidence, nor any affidavits besides his own, to support his assertions. In fact, the attending physician for the father since 1997 until his death stated in writing that, in his estimation, even with the surgical procedures on his brain, the father’s mental and testamentary capacity remained intact. Furthermore, evidence was lead through a letter from J. Alan Hodgson, the solicitor who acted on the preparation and execution of the father’s will. While Mr. Hodgson retained no notes of his involvement with the will, he did indicate that he recalled the father’s failing health and the Respondent’s assistance with English translation.

On the preliminary motion in respect of the will challenge and testamentary capacity proceedings, the Respondent argued that the Applicant was not entitled to challenge the will or to seek an Order for Directions because he failed to meet the threshold requirement to do so. The Respondent relied on Rule 75.03(1), which required the Applicant to establish a “financial interest” in the estate.

¹ 2008 CarswellOnt 5297, September 2, 2008 (Ont. S.C.J.).

² *Ibid.* para. 1.

³ 2008 Carswell 4488, July 18, 2008 (Ont. S.C.J.).

In coming to its conclusion, the Court considered the provisions of this Rule and Rule 75.06(1), which states that any person “*who appears to have a financial interest in an estate may apply for directions.*”

The Applicant argued that the language in Rule 75.03(1), and Rule 75.06(1) by extension, is permissive in that it does not require that a person *must* have a financial interest but rather must only *appear* to have a financial interest in the estate.

The Court considered some of the relevant statutory authority and case law in this area. In particular, the Court considered the Applicant’s argument that he had a contingent interest as an intestate heir pursuant to the provisions of the *Succession Law Reform Act*.⁴

The Applicant also relied upon the cases of *Korsten v. Lovett*⁵ and *Smith v. Vance*.⁶ Justice Allen noted both cases involved the issue of whether or not the Applicant appears to have a financial interest in the estate and noted further that the Court in *Korsten* relied on *Smith* which held:

“... claimants must do more than simply assert an interest. They must present sufficient evidence of a genuine interest and meet a threshold test to justify inclusion as a party. It need not be conclusive evidence at the stage but must be evidence capable of supporting an inference that the claim is one that should be heard [*Smith, supra*, at para. 10].”

Justice Allen found that the Applicant in this case was merely making an assertion as to an interest and did not have sufficient evidence to establish a genuine interest in the estate. Furthermore, he had not offered any medical evidence that his father was incompetent around the time the will was prepared and executed. In the circumstances, the Court dismissed the application with costs to the Respondent.

The decision is an important reminder of the threshold that must be met when proceeding with a will challenge and, in particular, in testamentary capacity cases.

Brydon v. Malamas

On June 24, 2008, the British Columbia Supreme Court in *Brydon v. Malamas*⁷ undertook an extensive analysis of several fundamental concepts in the context of a testamentary capacity will challenge hearing. In particular, the Court undertook a detailed examination of the credibility of various witnesses at the trial, providing guidance in the context of what evidence is helpful and what evidence is not as persuasive in these types of proceedings.

Of importance, the Court also discussed the concept of psychotic delusions in the context of a challenge to testamentary capacity.

⁴ R.S.O. 1990, c. S.26, as am. [the “SLRA”].

⁵ [2002] O.J. No. 4223 (Ont. S.C.J.) [*Korsten*].

⁶ 1997 CarswellOnt 1554 (Ont. Div. Ct.) [*Smith*].

⁷ 2008 BCSC 749, 41 E.T.R. (3rd) 104, [2008] B.C.W.L.D. 5347, [2008] B.C.W.L.D. 5349, [2008] B.C.W.L.D. 5351 [*Brydon*].

In *Brydon*, the Court considered the circumstances of the estate plan of Stella Sirgianidis, who passed away on October 19, 2004. The Plaintiff in the proceedings was her grandniece and goddaughter. Stella had suffered from schizophrenia since 1975 and had made a will in 1995 leaving her house and one-half of the residue of her estate to the Plaintiff. Stella had already transferred her interest in a second property to the Plaintiff. In 2004, Stella was committed for several months to a psychiatric department of a hospital and, on her release, her sister, the Defendant, Mary Malamas, moved into Stella's home.

Stella refused to undergo any treatment and was eventually readmitted to hospital. When she was released again into Mary's care, she transferred her bank accounts into joint names with Mary and changed the beneficiary designation of her RRSP to Mary. Stella also transferred her joint interest in her home to Mary, and made a new will making Mary her main beneficiary and excluding the Plaintiff.

Upon Stella's death, the Plaintiff brought proceedings challenging the validity of the new will and the *inter vivos* transactions surrounding the estate plan, on the grounds that Stella lacked mental capacity.

The Court held that the only identifiable reason for Stella turning against the Plaintiff was a false belief. This belief was caused by a psychotic delusion which, when added to her other delusions, affected her mental processes so as to poison her affections against the Plaintiff. As a result, the Court held that the Defendant had failed to discharge the burden of proving that Stella had the requisite testamentary capacity at the relevant times.

In addition, the Court considered the relevance of the psychotic delusions in the context of determining whether or not Stella had testamentary capacity. Specifically, the Court examined whether Stella's false beliefs met the requirement for an "operative psychotic delusion required by law".⁸

Among other things, the Court considered the important decision of the Supreme Court of Canada in *Royal Trust Co. v. Ford*.⁹ In *Royal Trust Co.*, the testator had made a will in 1933 in which he left most of his estate to his son. He made a new will in 1958, which only left part of his estate to his son. The son challenged the 1958 will, on the ground that his father had an insane or psychotic delusion that he was not the natural father of his son. At first instance, the trial judge found that no psychotic delusion had been proved, and that the testator had knowledge of the actual truth, namely, that his son was legitimate. The Court of Appeal held that the trial judge had erred in failing to find that a psychotic delusion existed, and set aside the 1958 will as being invalid. On appeal, however, the Supreme Court of Canada restored the trial judgment, and agreed with the trial judge that no insane delusion was shown to exist stating:

"The propounder of a Will must prove by a preponderance of evidence that the testator was competent in every respect, and this includes negating the existence of any insane delusions. On a consideration of all the evidence and in the light of dealing with an otherwise thoroughly competent testator, the Trial Judge rejected the contention that a delusion existed. He found that the testator really believed the son to be legitimate even though he expressed doubt. Although the 1933 Will was largely in the son's favour, a separation for 31 years

⁸ *Ibid.* at para. 201.

⁹ [1971] S.C.R. 831, 20 D.L.R. (3rd) 348 (S.C.C.) [*Royal Trust Co.*].

prior to the 1958 Will and the reception of bad reports about his son were sufficient reason for a sane testator to change his Will. Furthermore, a legacy of \$50,000.00 was inconsistent with a testator having a poisoned mind resulting in the complete rejection of his son, and consistent only with belief in his legitimacy or, at most, doubt. Whether the testator's suspicions were reasonable or not, they were such as a sane man could hold."¹⁰

The Court in *Brydon* considered the *Royal Trust Co.* decision and noted that the essential finding of fact in that case was that the testator did not believe that he was not the natural father of his son and, therefore, did not believe in the truth of the fact that was proved to be false. Furthermore, the Court held that the mere expression of doubt as to the truth of a fact (even a fact which is obviously true) could not qualify as a psychotic delusion.

The Court in *Brydon* went on to consider another insane delusion case, that of *Skinner v. Farquharson*.¹¹ In this case, a testator had made a will which greatly favoured his son and his wife. Seven years later he made a new will, in which he reduced the provisions for his wife and his son. Before signing the later will, the testator had accused his wife and son of committing incest, but there was no foundation for such accusation.

The trial judge held that the will was valid and it was admitted to probate. The Nova Scotia Court of Appeal set aside the trial judgment and held the will to be invalid. The Supreme Court of Canada, however, allowed the appeal and restored the trial judgment.

In coming to its own conclusion respecting the concept of insane delusions in the context of testamentary capacity, the Court in *Brydon* cited the words of Justice Sedgewick in *Skinner*, where he discussed the definition of an insane delusion, and in doing so made the following statements:

"... an insane delusion is defined as to be a belief of things as realities which exist only in the imagination of the patient.

...

... Delusion is insanity where one persistently believes supposed facts (which have no real existence except in his perverted imagination) against all evidence in probability and conducts himself however logically upon the assumption of their existence."

Justice Sedgewick went on to hold that the testator's belief that his wife and son had been guilty of incest "had no foundation whatever in fact, but that the unfortunate man's belief in the existence of the offence as charged by him existed only in his own morbid imagination".

Carefully applying the law, the Court in *Brydon* held that the deceased did indeed suffer from an insane (psychotic) delusion and so lacked testamentary capacity.

¹⁰ *Ibid.* at page 359.

¹¹ (1902), 32 S.C.R. 58 (S.C.C.) [*Skinner*].

Undue Influence

In *Hix v. Ewachniuk Estate*,¹² Justice Hinkson of the British Columbia Supreme Court carefully addressed a situation where it was alleged that a will was procured by undue influence. The deceased, Sophia, in that case had passed away on June 1, 2006 at 90 years of age. She had been predeceased by her husband, who had passed away in 1984. The two had three children, the Plaintiffs, Mary and Neeva, and the Defendant, Ted. The Defendant was the named executor of the will executed by Sophia on January 11, 2004.

The Plaintiffs alleged that the will was drafted and executed under suspicious circumstances and was not a true and valid will of the deceased. They alleged lack of testamentary capacity, undue influence and that the will contained a condition that was contrary to public policy.

The controversy in this case centered around the fact that Ted appeared to receive an unfair portion of the estate by virtue of the provisions of the will, which provided that the two daughters, Mary and Neeva, would share in the residue of the estate only if they transferred all of their shares in the family holding company to Ted. As such, the two daughters challenged the validity of the will on the basis as set out above.

With respect to the question of undue influence, the Court considered the leading decision of *Vout v. Hay*,¹³ and emphasized that while a testator may appreciate what he or she is doing, his or her will may still be the result of coercion or fraud. The Court went on to remind litigants that, despite the presence of suspicious circumstances, the burden of proving undue influence rests on the Plaintiffs. Undue influence can, however, be established on a balance of probabilities through circumstantial evidence.¹⁴

In finding that Ted did indeed procure Sophia's will by undue influence, the Court carefully analysed Ted as a witness and the circumstances surrounding the execution of the will. The Court was cautious to note that, because no one except Ted knew of the preparation and the terms of the challenged will prior to the death of Sophia, the only evidence from which to assess the presence or absence of coercion was his. However, the Court went on to note that it is clear that this does not suggest that the onus lies upon Ted to disprove coercion, as it clearly does not. Nonetheless, the reality of the situation that he created was such that the Court had to assess the allegation of coercion by testing his evidence against the "preponderance of probabilities that rationally emerge out of all the evidence in the case".¹⁵ In the end, the Court concluded that Ted unduly influenced Sophia in executing the will and that it was contrary to what she would have done of her own free will. As a result, the will was declared invalid.

Due Execution

In *CIBC Trust Corp. v. Horn*,¹⁶ the Ontario Superior Court considered the question of due execution in the context of an application brought by CIBC Trust Corporation ("CIBC") in respect of the estate of Hazel Myra Cake. CIBC sought advice and direction from the Court as to the

¹² 2008 BCSC 811, 2008 CarswellBC 1300, June 13, 2008 (B.C. S.C.) [*Hix*].

¹³ (1995), 7 E.T.R. (2nd) 209, 1995 CarswellOnt 186, 1995 CarswellOnt 528, 125 D.L.R. (4th) 431, [1995] 2 S.C.R. 876 (*sub nom.* Hay Estate Re 183 N.R. 1, *sub nom.* Hay Estate Re 82 O.A.C. 161 (S.C.C.)).

¹⁴ See *Araujo v. Neto*, 2001 BCSC 935 (B.C. S.C.) at para. 132, (2001), 40 E.T.R. (2nd) 169 (B.C. S.C.).

¹⁵ See *Faryna v. Chorny* (1951), [1952] D.L.R. 354 (B.C. C.A.) at 359, (1951), 4 W.W.R. (N.S.) 171 (B.C. C.A.).

¹⁶ 2008 WL3332830 (Ont. S.C.J.), 2008 CarswellOnt 4706, August 7, 2008 (Ont. S.C.J.) [*CIBC Trust*].

proper administration of the estate in light of the numerous handwritten notes that were added to the will and codicil of the testatrix, who died on October 10, 2006.

By way of background, CIBC was named estate trustee of the estate and a will and codicil were signed by the testatrix on September 5, 2000. Subsequent to their execution, the typewritten will and the codicil were substantially altered by handwritten, undated and unsigned notations beside a number of the specific bequests. In addition, three further handwritten unnumbered paragraphs were added to the will.

The Court was asked to consider whether or not any of the alterations or changes to the will and codicil were valid. In considering this question, the Court referred to sections 3 and 4 of the *Succession Law Reform Act* (the "SLRA"),¹⁷ where the requirements as to due execution are clearly established.

The Court also considered sections 15 and 18 of the *SLRA*, which deal with the issues of revocation and alteration. The Court noted that, since intent is a necessary element in revocation, a testatrix must be of sound mind and have the requisite testamentary capacity to do so. As part of its analysis, the Court also addressed section 6 of the *SLRA*, dealing with holograph wills and the handwritten notations made by the testatrix were considered in that context as well.

The doctrine of substantial compliance was also addressed by the Court, and it was noted that *Sills v. Daley*¹⁸ still stands for the proposition that, in Ontario, there is no room for the doctrine of substantial compliance.

The *CIBC Trust Corp. v. Horn* decision is a helpful review of a Court's approach in dealing with numerous handwritten changes in the context of the fundamental due execution issues that were present. Ultimately, the Court in that case held that none of the handwritten changes or additions to the will and codicil had the effect of changing the provisions of the typewritten will and codicil. As a result, CIBC was directed to administer the estate in accordance with the provisions of the typewritten will and codicil properly executed by the testatrix, without considering any of the handwritten changes or additions.

Conclusion

The recent case law dealing with the issues of testamentary capacity, undue influence, due execution and lost wills underscores the continuing importance of applying first principles to the particular facts in each case. The Courts continue to remind counsel of the importance of a principled analysis and caution litigants that unreasonable positions may invoke cost consequences that might not otherwise have been expected.

¹⁷ *Supra* note 8.

¹⁸ (2002), 64 O.R. (3rd) 19, E.T.R. (3rd) 297.