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Will kits can create recipe for disaster

Whatever money Pauline Rudling saved by using a will kit instead of a lawyer to prepare her last will and testament was spent hundreds of times over on legal fees so that a judge could figure out what she meant.

Shortly before she died in January 2003, Pauline Rudling made a will using a will kit. In it she left her two properties on Shaw St. in Toronto to her two sons, one house to each. Because of some ambiguous wording in the will, her sons wound up in a seven-day trial back in 2007, spending tens of thousands of dollars on lawyers to try to determine how the estate should be divided.

The blanks on the will kit document were filled in, in Pauline's presence, by her son Larrie. Pauline read it before she signed it.

The standard form pre-printed wording directed that all of Pauline's debts, estate expenses, inheritance and death taxes be paid by her executor following her death.

The will then provided that one of her houses on Shaw St. be left to her son Ron, "with all loans, liens, mortgages attached." The other house was left to Larrie, "free and clear of all debt."

Essentially, there were no other assets in the estate.

The sons disagreed on whether taxes and estate expenses were to be shared equally between them or deducted only from the value of Ron's house.

Ron's view was that all taxes and estate expenses, except for the mortgage on the house he inherited, were to be taken off the top and shared equally between the brothers.

Larrie wanted his house "free and clear of all debt," and took the position that all estate costs, taxes and expenses were to be paid from the value of Ron's house.

In the end, Justice J. Patrick Moore agreed with Ron and ruled that all expenses of the estate, except for the mortgage on the house Ron inherited, had to be shared equally between the brothers. Larrie was ordered to pay legal costs of $43,000.

Larrie appealed to the Court of Appeal but failed to attend the hearing earlier this year, and was ordered to pay an additional $10,000 in costs.

I was reminded of the Rudling litigation when a client came into my office earlier this month with the will of her late mother. She wanted to obtain a court certificate of appointment of estate trustee, formerly known as probate.

The will had also been prepared using a will kit widely promoted to the public. The kit included a power of attorney for property and a power of attorney for personal care, also known as a living will.

Someone in the family had photocopied the documents in the kit, but instead of using only one side of the paper, the photocopies used both sides. That wouldn't have been a serious problem if the pages had all matched in the right order, but when the will was finally signed and witnessed, it contained several pages of the power of attorney mixed in with the bequests in the will. One set of signatures is (improperly) in the middle of the document, and another set at the end.

Hopefully, the court will be able to figure out what parts to consider and what parts to ignore.

Over the years, will kits have produced a bonanza of work and fees for lawyers trying to sort out the mess caused by these little time bombs. An online Quicklaw database search of American and Canadian court cases using the phrase "will kit" will yield hundreds of cases like the Rudling one.

Using a will kit is like reading a cookbook. All the ingredients for the recipe may be listed, but if they aren't used in the right way, the result can easily be a disaster.

Ask any lawyer experienced in wills and estates: There is really no such thing as a simple will. If you use a will kit, make sure the estate has enough money to blow on legal fees to figure out what it really means.

THREE DECISIONS FOLLOW:

Rudling Estate v. Rudling, 2007 CanLII 51794 (ON S.C.)

Related decisions

- **Court of Appeal for Ontario**

  Rudling Estate v. Rudling, 2009 ONCA 332 (CanLII) - 2009-04-22

Legislation cited (available on CanLII)

- Succession Law Reform Act, R.S.O., 1990, c. S.26

COURT FILE NO.: 01-4429104

DATE: 2007/12/03

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Ronald William Rudling, Estate Trustee With a Will of the Estate of Pauline Rudling Plaintiff **- and -** Larrie Michael Rudling Defendant	)	R. D Ambrosio, for the Plaintiff K. Power, for the Defendant
	)	
	))	**HEARD:** November 20, 21, 22, 23, 26, 27, 28, 30, 2007

Moore J.

[1] Pauline Rudling is survived and fondly remembered by her two sons, the parties in this action, Ron and Larrie.

[2] Pauline died on 18 January 2003. Shortly before she passed on, she made a will and left her two properties, 887 and 940 Shaw Street to her sons, one property to each. The sons cannot agree upon the appropriate interpretation of the will. In essence, they disagree on whether taxes and other estate expenses are to be shared between them.

[3] There has now been a trial of an issue to determine the brothers dispute.

The Will

[4] The Last Will and Testament of Pauline Rudling is a standard form, fill in the blanks will kit document dated 30 November 2002. It is witnessed and bears Pauline s mark, an X, on the signature lines on the final two pages and, it is initialed with her mark and the initials of the two witnesses on each of its four pages.

[5] The hand printing was added into the will in Pauline s presence by her son, Larrie. Pauline read the will in its entirety before executing it.

[6] In paragraph 3 of the will, in the standard form text, this wording appears:

I DIRECT all my just debts, funeral and testamentary expenses, all succession duties, inheritance and death taxes, and all expenses necessarily incidental thereto, to be paid and satisfied by my Execut (or added in hand printing) as soon as conveniently may be after my death.

[7] The following paragraph provides that any beneficiary who dies within 365 days of Pauline s death will be deemed not to have survived her and provides for the following distributions of her assets:

a) To Ron Rudling I leave 940 Shaw St. Toronto Ont. With all loans, leins, mortgages attached.

To Larrie Rudling I leave 887 Shaw St. Toronto free and clear of all debt.

b) I DISTRIBUTE any residue of my estate as follows:

To my two sons Ron Rudling & Larrie Rudling to be divided evenly 50 50

The Positions of the Parties

[8] There is no contest about the validity of the will. There is no other will competing for consideration in this case. The properties were worth approximately equal amounts at the time of Pauline s death.

[9] Although the true size and shape of the estate at the time of death and the expenses arising in connection with the estate after Pauline s death were not the subject of evidence at this trial, I understand that there is considerable controversy between the parties on these matters. For purposes of this trial, it appears that the parties are content that the only estate assets of relevance are the two Shaw Street properties.

[10] The plaintiff s primary position is that the will is clear in its language and that a fair reading of the will and particularly of these quoted excerpts supports the interpretation that all the expenses of the estate, other than the mortgage registered on the 940 Shaw Street property, must be paid out of the assets of the estate.

[11] The parties agree that at the time of her death, Pauline was debt free, but for any mortgages that were registered on title for 940 Shaw Street. The plaintiff s position is, therefore, that the funeral and testamentary expenses incurred following upon Pauline s death, inheritance and death taxes, capital gains taxes and all properly incurred estate administration expenses must be paid by the estate and, if no other assets exist but for the two properties on Shaw Street, paid from borrowings made in equal proportions against the equity in those properties.

[12] The plaintiff submits that the word debt in the bequest of 887 Shaw Street has a specific and narrow meaning; he asserts:

> that when the word debt as used by the testatrix is examined along with the will as a whole and read in the light of the circumstances known to the testatrix at the time the will was made, the word debt should be interpreted by this Court to mean Ronnie s debt . More so, the Last Will and Testament of Pauline Rudling should be read as 887 Shaw Street going to Larrie Rudling free and clear of all Ronnie s debt .

[13] Arrangements are in place in order that funding of estate expenses can be accomplished in the manner sought by the plaintiff.

[14] The defendant is confident that the will can be interpreted upon its terms without reference to extrinsic circumstances and that the language of the will can be considered to be clear and compelling; the defendant asserts that the wording of the will supports the outcome he seeks, which will visit all costs, expenses and taxes generated as the result of Pauline s death solely upon that portion of the estate that excludes the asset left to him, 887 Shaw Street.

[15] Put another way, the defendant seeks to take 887 Shaw Street intact and without having to pay anything toward mortgage or other debts attaching to 940 Shaw Street at the time of Pauline s death or afterwards nor anything toward estate related expenses either.

[16] To the extent that the language of the will might be considered ambiguous and in need of amplification or explanation by reference to the circumstances surrounding the making of the will, the parties hold opposite views.

[17] The plaintiff asserts that the whole of the relevant circumstances support the view that Pauline intended to leave her estate to her sons in equal shares, net after appropriate estate expenses were satisfied.

[18] The defendant asserts that Pauline intended to favour him in her bequest of 887 Shaw Street such that he would be insulated from any expense that might diminish its value at the time of Pauline s death.

[19] Whether extrinsic circumstances are to be considered or not, the plaintiff submits that, as the defendant assisted Pauline in the preparation and execution of the will and that as Larrie, in his capacity as the original executor of the estate, propounded the will and still to this day supports its reasonableness and validity, the will must be interpreted against Larrie s interests, as a matter of law. The plaintiff asserts, in particular, that:

> if the rules of construction are inconclusive and if the court is attempting to decide between two possible meanings, one being as probable as the next, the rule of *contra proferentem* should be applied to settle the dispute against the interests of the draftsman of the document.

[20] Finally, the plaintiff relies upon the provisions of section 22 of the *Succession Law Reform Act* R.S.O. 1990, c. S.26 in support of the proposition that the bequests made in the will are fixed at the time of death and that they are subject to reduction by taxes, charges and other expenses arising after death and payable by the estate. That section reads as follows:

> Except when a contrary intention appears by the will, a will speaks and takes effect as if it had been made immediately before the death of the testator with respect to,
>
> (a) the property of the testator; and
>
> (b) the right, chose in action, equitable estate or interest, right to insurance proceeds or compensation, or mortgage, charge or other security interest of the testator under subsection 20(2).

[21] On this issue, the plaintiff frames his submission as:

> As there is no contrary intention in the Will, it is to be construed as at the date of death. When this rule is applied to the case at bar, the term debt should be taken to mean debt as at the date of death, and not debt that subsequently arises.

[22] The plaintiff says that the defendant has failed to establish his position and has failed to corroborate his own evidence. The plaintiff asserts:

> Broadly stated, the Plaintiff s evidence was supported by the documents or the application of common sense and probability. However, and more importantly, the evidence of the Plaintiff was corroborated on every material point of evidence, as is required under section 13 of the *Evidence Act*.
>
> The Defendant did not provide any admissible evidence to support his suspicions and beliefs. Furthermore, most if not all of his evidence was not corroborated by the documents or any of the other witnesses. In the end, all the Defendant s case is based on unsubstantiated evidence and allegations.

Court Orders

[23] By order dated 8 February 2006, Bellamy J. ordered that a trial of the issue is the interpretation on the will of Pauline Rudling.

[24] From the description of the Application before Her Honour, it appears that Ron had applied, in his capacity as Estate Trustee, for an interpretation of the phrase free and clear of all debts as it appears in the will.

[25] Additional relief sought in this application was adjourned pending the result of the trial of the issue and Bellamy J. added directions and timelines for proceedings to precede the trial of the issue.

[26] By order dated 30 November 2006, Belobaba J. ordered that there be a trial of an issue on the interpretation of the will.

[27] Belobaba J. also made directions on procedural matters, including that the parties exchange pleadings.

[28] The pleadings define the issues for this trial more broadly than the wording apparently used in the original Application.

The Central Issue

[29] Both because of and despite the assertions contained in the pleadings, the central issue in this case is whether the will can be fairly construed upon the language contained within its four corners and without need of extrinsic evidence?

[30] In my view the answer to that question is yes; the answer is clear, so clear in fact that I view the trial of this action to have been wholly unnecessary.

[31] It would require a tortured interpretation of the word debt , as used in relation to the bequest of 887 Shaw Street to include within its meaning all of the taxes, expenses and other charges that the Estate Trustee is directed by the will to satisfy in addition to debts of the estate.

[32] I have no hesitation in finding that all reasonable charges against the estate arising from the death of the testatrix are, by the terms of the will, intended to be paid from the estate before the specific bequests of the two properties are made at the 365 day mark after Pauline s death.

[33] In light of the Orders earlier made by this court and of the broader statement of the issue in the pleadings, however, and because I am aware of the recent tendency of Canadian courts to apply the armchair rule to the interpretation of wills, I will also address the interpretation of the will in light of the circumstances surrounding the will.

The Armchair Rule

[34] In his 2 volume book on and entitled *Estate Litigation* (volume 2, *Second Edition,* Thomson*Carswell, c. 18.6) Brian Schnurr confirms that:

> Courts in Canada have generally taken a more liberal approach with respect to the issue of the admissibility of evidence of surrounding circumstances, *i.e.* the circumstances of which the testator was aware when he made the will. Under the rule which has come to be known as the "armchair rule", the evidence of surrounding circumstances is admissible in construing each and every will ..
>
> However, while evidence of surrounding circumstances is admissible, direct evidence of the testator's actual intention is not admissible.

Extrinsic Circumstances - the Challenge

[35] This court heard evidence from 10 witnesses over the course of 7 days, ostensibly on the circumstances surrounding the making of this will. If that was the object of the exercise, much of the evidence missed its mark.

[36] Both parties sought to retrace the family history and inter-personal relations back through several decades with the inevitable result that the margins of relevance to the issue of the circumstances surrounding this will became very blurred.

[37] The parties hold differing recollections of life within the Rudling family. They and some of the witnesses, notably Donna Rudling, were clearly challenged in their attempts to maintain objectivity and to resist recounting revisionist views of the family history.

[38] What seemed to be lost on the parties is that the court is not assisted by evidence of the management of the estate of their father, who passed away in 1972. Neither brother has ever seen their father s will and yet they disagree about the extent to which Ron may have obtained assets their father left behind. This case, however, is not the proper vehicle by which to settle issues or resentment lingering from the father s passing.

[39] Nor is this court helped by finger pointing by the parties and others about who attended more often upon or exhibited more compassion or provided more care and comfort for Pauline during her last years of life.

[40] Both sons cared for their mother when they could. Both knew that they each played an important role in looking after Pauline s care and feeding. It was not a contest, particularly as the evidence clearly established that Pauline enjoyed around the clock monitoring and care from nannies and other health care professionals during the many years that she was burdened with the very severely disabling effects of rheumatoid arthritis, until her death in January 2003.

[41] Similarly, much time and attention was focused on Ron s business dealings and with an assault upon him that apparently arose from a business venture ongoing in 1992. Admittedly, Ron was beaten and left for dead and undoubtedly Pauline was upset, traumatized and even annoyed by the event and concerned, as a mother, for the well being of her son. That said, however, there was no evidence that Pauline was ever afraid to be with Ron or that such a concern could reasonably have been a circumstance relevant to the making of her will on 30 November 2002. Indeed, even Larrie confirmed his belief that his mother did not fear Ron, at least not physically.

[42] These are but a few examples of the tangents traveled in some of the evidence. Apparently the disagreements between the parties are many and ongoing, some in litigation before this court.

[43] Upon the whole of the evidence it is clear to me that Pauline loved both of her sons. Rupert Feurtado was a long time friend of the family and a witness to the will. In his cross-examination, Rupert agreed that he heard Pauline say that she has two boys and that one should get one house and the other should get the other house. He interpreted that to mean that she intended to treat her sons equally.

[44] He stated that she loved both of her boys and added, with refreshing objectivity and emphasis, very much so . On leaving the stand, Rupert volunteered: "if I may say so, Mrs. Rudling would like to see her two boys share everything in peace, no fussing or fighting". If only they had listened to him.

[45] Accordingly, the challenge in this case is to sort through the evidence and separate out accusations grounded in suspicion and anger from those that inform a fair view of the meaning of the words appearing in the will.

Pauline s Health

[46] Pauline was described, uniformly by witnesses in this case, as strong . She was physically well and active through much of her life. She developed rheumatoid arthritis and it became worse over time. She began to use a wheelchair in about 1983, within about 10 years of the death of her husband.

[47] Over the ensuing years, she became more disabled physically but remained bright and, as Ms. Reeson put it, Pauline was intellectually quite alert, very strong, caring and very inclusive of new people.

[48] Another witness, Coral Sym, Pauline s friend and bookkeeper for many years, an articulate and credible historian, described Pauline as very strong willed and old-fashioned. She added that she "says exactly what's on her mind" and was plain spoken . She also used the words "very sharp as a tack". No games, no word play , she said. She added that Pauline knew right down to the last dime where the money went .

[49] Although he added precious little to the case, certainly Aaron Rudling, Pauline s grandson, was well positioned to describe Pauline s mental acuity. He confirmed that Pauline's mind was sharp at all times. They joked together. She was "definitely on the ball all the time", he said.

[50] There is no issue of testamentary capacity before this court but the evidence about Pauline s mental acuity is helpful for it demonstrates that she continued to enjoy a fairly high level of cognitive functioning over the years until the time she placed her mark upon the will, her arthritic condition having robbed her of the ability to write her name.

[51] Indeed, both sons saw their mother after the will was made; they visited and spoke with her in hospital in the weeks before her death. Almost until the end, she knew her own mind and was quite sharp. On this one thing, both parties agreed.

[52] Until at least November of 2002, Larrie believed that his mother remained capable of managing her financial affairs. Larrrie asserts that Pauline was hindered in that regard by the fact that Ron aggressively assumed and managed those affairs for their mother. That, even if true, is a matter very different from Pauline s ability to understand her affairs or the

meaning of simple words in a document such as this will.

[53] Ron spoke to a different version of the extent to which Pauline was active in managing her affairs in the years leading toward the end of 2002. He asserts that Pauline knew of the mortgages in place over those years on her rental income property, 940 Shaw Street. According to Ron, Pauline willingly allowed Ron to use that property as collateral for his business and personal financial dealings. Clearly, Ron was also of the view that Pauline was mentally fit and active at all relevant times.

[54] Ron was not aware that his mother had made the will but he raises no concern here that she was unable to understand any language in the will, quite the contrary.

[55] When asked whether Ron would ever steal money from Pauline, Coral Sym laughed and said that she was too smart and too sharp and she didn't have any money for Ron to steal in any event.

[56] Without reservation, I accept the evidence clearly and convincingly given by Ms. Sym that Pauline understood the content of the tax returns Ms. Sym prepared for her over the years. Whenever Pauline had any questions arising from her review of the tax returns, she asked those questions of Ms. Sym and continued to ask questions until her concerns were satisfied.

[57] It follows that, even as an octogenarian, Pauline well understood her assets, liabilities, income and expenses as detailed in the many tax returns Ms. Sym prepared.

[58] Ms. Sym also said, and I accept this to be so, that Pauline was very proud that she had two properties to leave, one to each of her boys. She added that Pauline was aware that there were mortgages on number 940 Shaw Street. Pauline allowed Ron to use the house as collateral for his loans.

[59] In the result, upon the evidence and in view of the fact that there is no evidence suggesting, let alone establishing, that Pauline was unable to understand her financial affairs, the question becomes: Do the relevant extrinsic circumstances support an interpretation of the will that turns the will into a vehicle aimed at redressing financial wrongs perceived by the defendant, wrongs created by Ron s business dealings and allegedly adversely affecting either Pauline or Larrie or both of them? The answer must be: No.

[60] Clearly, Pauline was not shy about expressing her views nor unable to intelligently articulate them. Conspicuous by its absence in this case is any evidence that Pauline wished to treat her sons otherwise than equally. A fair reading of the language Pauline endorsed as appropriate at the time she placed her mark upon her will requires application of the concepts of equality and balance, concepts clearly established by reference to the extrinsic circumstances.

[61] To interpret the will as the defendant seeks will result in an outcome that spares the defendant and visits the estate s necessary and proper expenses upon the plaintiff. Relevant extrinsic circumstances in evidence in this case simply do not support the defendant s interpretation of Pauline s will.

The Key to this Case

[62] In my view, the key to this case is found within the read-ins from the transcript of the Examination for Discovery of the defendant, now a part of the plaintiff s case. Relevant portions follow and they clearly contradict the position of the defendant and speak volumes about the reasonable interpretation of Pauline s will called for in this matter:

Relevant Excerpts:

P 102 Q 651 ..she was worried about things we didn't know that Ron had probably, or may have put, or may not have put in her name, or her married name .. we were very worried more about what we didn't know then what she knew. And made it clear that Ronnie was to get 940 Shaw, because he had-- I guess he had a mortgage on it. I wasn't really aware of what, or how much, or what any details were. That's Ronnie's business-- and I was to get 887 free and clear of all debts and monies

P 103 Q 652 ***.Ronnie gets one house, I get the other house, and that was it***

-

Q 655 ***whatever bills and mortgages and problems he's created for himself would be his problem, not mine***. It seemed at the time very simple and perhaps now I think it was too simple

p 109 Q 689 no, my mother said we've got to keep it simple

Q 690... ***then she said Ronnie gets 940 Shaw St with all the money owed . so let's make that part clear. "Free and clear of all debt". Which didn't make me, we thought, responsible for any of Ronnie's debts. That seemed to be my mother's main concern***.

(Emphasis added)

[63] Larrie stated at trial that his mother was petrified of losing her houses and yet his description at discovery of her concerns shows no sign of that. Rather, it seems more likely that she was interested in sparing Larrie any mortgage debt outstanding on 940 Shaw and leaving that property to Ron with whatever mortgage indebtedness upon it for Ron to manage.

[64] In my view, the language selected and used in the devises of the two properties accomplishes the spirit and object of Pauline s intention as described by Larrie. There is no suggestion in this evidence or elsewhere that supports going further and sheltering Larrie from proper estate expenses as well.

The Law

[65] The plaintiff submits, and I agree, that *Re Burke* (1950), 20 DLR (2d) 396 (Ont. CA) is an instructive case and adds:

In referring to the proper approach his Honour states, Each Judge must endeavour to place himself in the position of the testator at the time when the last will and testament was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give due weight to those circumstances in so far as they bear on the intention of the testator. He should then study the whole contents of the will and, after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator. When an opinion has been formed as to that intention, the court should strive to give effect to it and should do so unless there is some rule or principle of law that prohibits it from doing so.

[66] The defendant does not specifically dispute this proposition of law but asserts a different approach:

In *Cullen Estate v. Cullen*, (1997) 17 E.T.R. (2nd) 197 (Ont. Gen.Div.), the court considered a situation where there were insufficient assets to pay all the legacies in full. The court reviewed the abatement of general legacies, and found that in the absence of a contrary intention by the testator, that the general legacies in that case abated in equal proportion.

It is respectfully submitted there is a contrary intention in the will of Pauline Rudling. The phrase free and clear of all debt is a contrary intention and demonstrative that Pauline Rudling intended for Larrie Rudling to receive 887 Shaw Street in Toronto free and clear of all debt.

It is respectfully submitted that when interpreting the words in their ordinary context that the wording of the will is not ambiguous. It is respectfully submitted that the Plaintiff is seeking to rewrite the will from free and clear of all debt to free and clear of all debts up to the date of death . It is respectfully submitted that it is not the task of the court to rewrite the will.

[67] The defendant may rest assured that this court has no intention of re-writing the will in the instant case; I simply do not accept the interpretation of Pauline s will urged upon the court by the defendant.

Result

[68] This court interprets the Last Will and Testament of the late Pauline Rudling, her will dated 30 November 2003, such that all the expenses of the estate, other than the mortgage registered at the time of death on the 940 Shaw Street property must be shared equally between the plaintiff and the defendant.

[69] For clarity, I will add that I agree with the interpretation urged upon this court regarding the application of the provisions of section 22 of the *Succession Law Reform Act*. I find no contrary intention expressed within the will and read paragraph 3 of the will to conform entirely with section 22 of the act.

[70] Ordinarily, costs follow the event; however, the parties have not yet had an opportunity to make submissions on costs and, therefore, I will therefore I will not dispose of costs issues here.

[71] At the request of the court, the parties agreed to exchange bills of costs during the trial and again at the end of the trial; as such, they are well positioned to understand each other s position on costs issues and to agree upon the cost obligations that may arise. If, however, the parties cannot agree upon an appropriate order for costs, I may be spoken to.

MOORE J.

Released: 3 December 2007

Rudling Estate v. Rudling, 2009 ONCA 332 (CanLII)

Related decisions

- **Superior Court of Justice**

  Rudling Estate v. Rudling, 2007 CanLII 51794 (ON S.C.) - 2007-12-03

CITATION: Rudling Estate v. Rudling, 2009 ONCA 332

DATE: 20090424

DOCKET: C48162

COURT OF APPEAL FOR ONTARIO

Simmons, Blair and Epstein JJ.A.

In the Matter of the Estate of Pauline Rudling, deceased

BETWEEN:

Ronald William Rudling, Estate Trustee with a Will of the Estate of Pauline Rudling

Plaintiffs (Respondents)

And

Larrie Michael Rudling

Defendant (Appellant)

No one appearing for the appellant

Romeo D Ambrosio, for the respondent

Heard and endorsed orally: April 22, 2009

On appeal from the judgment of Justice Patrick Moore of the Superior Court of Justice dated December 3, 2007.

APPEAL BOOK ENDORSEMENT

[1] Neither the appellant nor counsel for the appellant are present at 2:55 p.m. It appears that the appellant is aware of the hearing date based on the affidavit filed in support of the March 4, 2009 order removing counsel. However, the file contains no affidavit of service of the order on the client/appellant. The appeal is dismissed as abandoned with costs of the appeal payable by the appellant personally to the respondent fixed at $10,000.00 on a partial indemnity basis inclusive of G.S.T. and disbursements. The costs shall be a charge on the appellant s portion of the estate. Copies of this order should be forwarded to counsel of record for the appellant and the appellant by ordinary mail.

Rudling Estate (Re), 2009 CanLII 37936 (ON S.C.)

Decisions cited

- Boucher v. Public Accountants Council for the Province of Ontario, 2004 CanLII 14579 (ON C.A.) 71 O.R. (3d) 291 188 O.A.C. 201
- McDougald (Estate) v. Gooderham, 2005 CanLII 21091 (ON C.A.) 255 D.L.R. (4th) 435 199 O.A.C. 203

COURT FILE NO.: 01-4429/04 & 02-91/05

DATE: 20090612

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: In the Matter of the Estate of Pauline Rudling, Deceased

BEFORE: Madam Justice L.B. Roberts

COUNSEL: Romeo D Ambrosio, for Ronald William Rudling, as Estate Trustee with a will of the Estate of Pauline Rudling and in his personal capacity

No one appearing for Larrie Michael Rudling and Larrie Michael Rudling not appearing in person

ENDORSEMENT

[1] Pursuant to the order of the Honourable Mr. Justice E. Belobaba dated May 5, 2009, the following three applications were returned before me for hearing on May 22, 2009:

i) Application by Larrie Michael Rudling per notice of application dated September 15, 2005, bearing court file no. 02-91/05 (Larrie Michael Rudling s application);

ii) Application by Ronald William Rudling per notice of application dated May 16, 2005, bearing court file no. 01-4429/04, for repayment to the Estate of Pauline Rudling of rental and other monies allegedly owing to the Estate by Larrie Michael Rudling (repayment application);

iii) Application for the passing of the accounts of Ronald William Rudling as Estate Trustee of the Estate of Pauline Rudling per notice of application dated December 12, 2005 (the passing of accounts application).

[2] These applications are the last outstanding matters remaining for determination in the protracted dispute between the parties, who are brothers, concerning the Estate of their late mother, Pauline Rudling, who passed away on January 18, 2003 (the Estate). Various steps have occurred and several orders have been made in these proceedings, including, most notably, a trial before the Honourable Mr. Justice Moore, resulting in his Judgment of December 3, 2007. The appeal of that Judgment made by Larrie Michael Rudling was dismissed as abandoned with costs by the Court of Appeal on April 22, 2009, as a result of Larrie Michael Rudling having failed to appear.

[3] Except as expressly noted below, any determinations that I make in the applications before me are not intended to and do not affect the previous orders and judgments made in these proceedings. The only matters that are before me are the last few issues noted above on which there has not been a prior adjudication.

[4] The hearing of the applications proceeded in the absence of Larrie Michael Rudling who had failed to appear before the conclusion of the hearing at 1:00 p.m. on May 22,

2009 and who had not sent any communications respecting his absence to the court or to counsel for Ronald William Rudling. I was satisfied from the affidavits of service filed and the court record that Larrie Michael Rudling had ample notice of the May 22nd hearing date and did not attend for reasons not communicated to counsel for Ronald William Rudling or to this Court.

Larrie Michael Rudling s Application:

[5] With respect to Larrie Michael Rudling s application, pursuant to rule 38.08(2) of the *Rules of Civil Procedure*, Larrie Michael Rudling is deemed to have abandoned his application by his failure to appear to-day and I so order. According to rule 38.08(3), the respondents to that application, namely, Ronald William Rudling as Estate Trustee and in his personal capacity, are entitled to their costs of the abandoned application. As requested by counsel for the respondents, I fix those costs and order them payable forthwith by Larrie Michael Rudling to the respondents in the amount of $750.00 including GST.

Estate Applications:

[6] I turn next to the applications brought by Ronald William Rudling on behalf of the Estate of Pauline Rudling (the Estate applications).

[7] A brief recitation of the undisputed, relevant background facts is required to put the Estate applications and their issues in the proper context.

[8] As noted above, Pauline Rudling died on January 18, 2003. She is survived by her two sons, Ronald William Rudling (Ronald) and Larrie Michael Rudling (Larrie). Mrs. Rudling made a will and left her two properties, municipally known as 887 and 940 Shaw Street, Toronto, to her two sons. She had no other beneficiaries and, essentially, no other property. Under Mrs. Rudling s will, Larrie was named as her Executor and Trustee and Ronald was named as the alternate Executor and Trustee. Larrie did not apply to be appointed as Estate Trustee with a will. On December 7, 2004, Ronald obtained an order replacing Larrie as Estate Trustee. There is no issue about the validity of Mrs. Rudling s will.

[9] On September 21, 2005, the brothers and the Estate entered into a settlement with respect to some of the issues in these applications. In particular, it was agreed that the 887 Shaw Street property would be transferred to Larrie and that the Estate could register a collateral mortgage against the 887 Shaw Street property in the amount of $80,000.00, without interest or principal payments required, in order to secure any amount that may be ordered by the court or agreed upon between the parties as owing to the Estate, at the time of the passing of the accounts. The 887 Shaw Street property was transferred to Larrie and the mortgage was registered on November 1, 2005.

i.) Repayment Application:

[10] In the repayment application, Ronald as Estate Trustee seeks repayment of the following amounts from Larrie to the Estate of Pauline Rudling:

i) rental monies collected by Larrie from the tenants of the 940 Shaw Street property from December 2002 to November 1, 2003 in the amount of $15,400.00;

ii) interest and penalties incurred by the Estate as a result of the failure by Larrie to file Pauline Rudling s income tax return following her death while he acted as Estate Trustee in the amount of $4,952.18 for penalties and $3,013.26 as interest;

iii) mortgage interest incurred by the Estate as a result of Larrie s failure to pay estate expenses and his dispute concerning his mother s will in the amount of $10,000.00;

iv) costs orders made against Larrie in these proceedings: $43,000.00 as the Estate s trial costs as ordered by Moore, J.; and $10,000.00 ordered to be paid by the Court of Appeal on Larrie s abandoned appeal from the Judgment of Moore, J.;

v) increased compensation to the Estate Trustee because of the failure of Larrie to take the necessary steps to administer the Estate while he was Estate Trustee and because of Larrie s unsuccessful dispute of the estate administration by Ronald;

vi) the costs related to the Estate s applications arising out of this hearing.

[11] With respect to the rental monies, in his affidavit sworn on May 12, 2005, Ronald alleges that Larrie started to collect rent monies from the tenants of the 940 Shaw Street property from December 2002 when his mother went into hospital until the rent monies were attorned to the Estate from November 1, 2003 onwards. The Estate asserts that Larrie has failed to account for those monies.

[12] The evidence of Larrie in his affidavit sworn on June 10, 2005 and filed in these proceedings is that he received approximately 9 months of rental payments and payments towards the utility expenses at the 940 Shaw Street property from the tenants of 940 Shaw Street until November 1, 2003, when the rents were attorned to the solicitor for the Estate, Christopher Crop. Larrie further asserts in his June 10, 2005 affidavit that from the monies collected he paid for bills and repairs to two homes on Shaw Street, money to my mother s caregiver, legal fees and some compensation to myself as I was executor at that time . He has not passed his accounts nor provided any particulars or documentation related to those expenditures.

[13] In his testimony given orally at the hearing of these applications, Ronald stated that he knew that his brother was collecting the monthly rent from the tenants at 940 Shaw Street and that his brother had not accounted to the Estate for those monies. Further, Ronald testified that when he took over as Estate Trustee, he discovered that bills had not been paid by his brother nor had necessary repairs been done to the 940 Shaw Street property. Ronald gave evidence that he had to carry out the required repairs and pay the outstanding bills. Ronald also deposed in his affidavit sworn on May 12, 2005, that all of the rental monies that the Estate has collected from the tenants have been spent by him for the upkeep of the 887 Shaw Street and 940 Shaw Street properties.

[14] I also note that the Trust Ledger of Christopher Crop, the Estate s lawyer, for the Estate of Pauline Rudling, which was attached as part of Exhibit A to Larrie s June 10, 2005 affidavit, shows that property taxes in the amount of $4,938.01 were paid by Mr. Crop on behalf of the Estate on March 9, 2004. Given the subsequent payment of interim taxes paid by Mr. Crop on behalf of the Estate, it is clear that the March 9, 2004 related to payment of tax arrears, supporting Ronald s evidence that Larrie had not paid expenses relating to the properties.

[15] As Estate Trustee, Larrie was required to hold the rental monies in trust for the Estate and account for those monies. He has failed to do so notwithstanding the Estate s application for him to provide an accounting which was commenced on May 16, 2005. Based on Larrie s own evidence and Ronald s evidence, it appears very unlikely that the rental monies were spent on repairs or expenses related to the 940 Shaw Street property. I am therefore compelled to draw an adverse inference from Larrie s failure to provide an adequate explanation or accounting of the rental monies and his unauthorized payment to himself of monies. I conclude that those monies were not used to repair or otherwise maintain the 940 Shaw Street property but were converted by Larrie for his own personal and unauthorized use. Larrie must therefore repay to the Estate nine months of rental income which he admits collecting in the amount of $12,600.00, plus, as requested, prejudgment interest at the rate of 2.8% (the rate in the quarter when the application was commenced) from November 1, 2003 to to-day.

[16] With respect to the Estate s claim for payment of the interest and penalties due, the evidence establishes that taxes were owing by the Estate on April 30, 2004 but were not paid by Larrie. Interest and penalties accrued from that date until payment in the amount was made by Ronald. As a result of Larrie s inaction, the Estate incurred tax penalties in the amount of $4,952.18 and interest in the amount of $3,013.26.

[17] Larrie did not resign his duties and responsibilities as Executor and Estate Trustee under his mother s will. Instead, he carried out some of his duties and responsibilities by collecting rent from the tenants and purporting to take care of the properties in the Estate. As such, he was undertaking the duties and responsibilities of Estate Trustee and had to fulfill all of them, including paying taxes for the Estate when they came due. Larrie has asserted a claim for Trustee compensation.

[18] As noted above, the evidence establishes that Larrie failed to pay Estate taxes. As a result, interest and penalties were assessed against the Estate, which would not have been incurred had Larrie performed his duties in a proper manner and paid the Estate taxes. Although this allegation is raised in the application to which he has responded by way of affidavit, he offers no explanation for his failure to pay the taxes. I do not think that it is fair that those monies should be paid from the Estate or that Ronald personally bear any portion of that expense. Larrie should bear the entire responsibility to pay those penalties and interest in the amount of $7,965.44.

[19] With respect to the mortgage interest, increased Trustee compensation, and costs claimed, the rationale for those claims is the same, namely, that Larrie s interpretation of his mother s wills concerning the responsibility for the Estate expenses was unreasonable and, had he not advanced that claim, the Estate could have been administered more quickly and with much less time, trouble and expense.

[20] With respect to the costs, in reviewing Justice Moore s Judgment, it is very clear that Justice Moore was of the view that the requirement to share the expenses between the beneficiaries was the only logical interpretation and that Larrie s interpretation had no merit. In particular, Justice Moore stated the following conclusion at paragraph 67 of the December 3, 2007 Judgment:

> The defendant may rest assured that this court has no intention of re-writing the will in the instant case: I simply do not accept the interpretation of Pauline s will urged upon the court by the defendant.

[21] In my view, it would be unfair to Ronald to require him to bear any portion of the added costs that Larrie s ill advised opposition caused. Long gone are the days when parties to Estate proceedings can expect that all of their costs will be paid from the Estate, regardless of the merit of their arguments or their conduct that increased costs: *The Canada Trust Company v. Gooderham et al.* 2005 CanLII 21091 (ON C.A.), 2005 CanLII 21091 (ON C.A.), at para. 85.

[22] With respect to the correct approach to be followed in the assessment of costs in estates proceedings, in *Re Evanoff Estate*, [2008] O.J. No. 4795 (Ont.Sup.Ct.J.), at para. 6, Justice D. Brown held that the court should take into account the usual factors and principles applied to other civil proceedings, including those factors set out in Rule 57.01 of the *Rules of Civil Procedure*, as well as the principles of fairness, reasonableness and proportionality enunciated by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* 2004 CanLII 14579 (ON C.A.), (2004), 71 O.R. (3d) 291; 2004 CanLII 14579 (ON C.A.).

[23] As a result, I agree that Larrie should be solely responsible for the amount $53,000.00 which represents the costs awards made by Justice Moore and the Court of Appeal against Larrie.

[24] That being said, I am not of the view that all of the mortgage interest and Trustee compensation should be Larrie s responsibility. The Estate did not have sufficient funds to pay the expenses that were funded through the mortgages on the Shaw Street properties. There is not sufficient evidence in front of me which would permit me to calculate the exact portion of the mortgage interest that should be attributed to Larrie s incorrect interpretation of his mother s will. Similarly, as noted below, the Estate Trustee s compensation is sufficient to compensate Ronald for his work on the Estate, and the costs awarded reflect Larrie s responsibility for his lack of success before Justice Moore and the Court of Appeal.

[25] With respect to the legal fees for the passing of accounts and the estimated accounting fees, those are expenses that had to be incurred in any event as part of the Estate Trustee s responsibility to pass his accounts and should be borne by the Estate.

[26] Finally, the Estate is seeking payment of the expenses paid on behalf of the Estate. Following Justice Moore s December 3, 2007 Judgment, I agree that Larrie must bear his share of those expenses.

ii.) Passing of Accounts Application:

[27] With respect to the application to pass the accounts of the Estate Trustee, the Estate Trustee submitted amended accounts for the period January 18, 2003 to April 4, 2009, which includes a period of time during which Ronald was not the Estate Trustee. The amended accounts were served on the former solicitors for Larrie on May 5, 2009. Other than the objections made to the original accounts by way of Notice of Objection to Accounts dated January 18, 2006 (Notice of Objection), no further objections were made to the amended accounts. In his *viva voce* evidence, Ronald attested to the accuracy and legitimacy of the contents of the amended accounts.

[28] Although Larrie had served a Notice of Objection, the Notice of Objection was not in the court file. While Ronald argued that the court should treat the Notice of Objection as abandoned, in the interests of justice, I reviewed and considered the objections made by Larrie to the accounts submitted by Ronald.

[29] Having reviewed all of the affidavit evidence filed and having heard the oral evidence given at the hearing by Ronald, with the exception of the objection concerning the calculation of Trustee compensation, I am of the view that the rest of the objections made by Larrie are without merit for the following reasons:

1. The Estate Trustee has provided a proper accounting of the estate assets.

2. The Estate Trustee has not made payments for personal expenses that were not for the benefit of the Estate. It is clear that Ronald had to pay expenses out of his own funds for which he is entitled to be reimbursed.

3. The Estate Trustee was even handed with respect to his administration and maintenance of the Estate s property. In particular, he carried out repairs and paid the expenses related to both Shaw Street properties.

[30] Larrie contends that the Estate Trustee has improperly claimed compensation for a period of time during which Ronald was not Estate Trustee. As noted above, Ronald replaced Larrie as Estate Trustee by order dated December 7, 2004; however, the period of time for which the accounts are being passed is January 18, 2003 to April 4, 2009. I agree that Ronald should only claim compensation for the period of time during which he was acting as Estate Trustee. He does not allege that he was acting as *de facto* Trustee prior to his appointment; otherwise, he, and not Larrie, would be responsible for the failure to pay taxes and the other Estate debts for which Ronald has made the above noted claim against Larrie on behalf of the Estate.

[31] As a result, Ronald will have to recalculate the amount of trustee compensation due to him as Estate Trustee from December 7, 2004 to April 4, 2009. This recalculation will require the amendment of the Estate accounts and of the calculation of damages claimed in these applications. The Trustee compensation should be paid out of the Estate. The accounting fees claimed should be added to and paid out of the Trustee compensation.

[32] With respect to the Trustee compensation claimed, the Trustee is seeking additional compensation in the amount of $40,000.00 because of extra work involved in administering this Estate, including the trial before Justice Moore and the hearing before me on May 22, 2009. As Ronald had to appear in his personal capacity in these proceedings and make or at least benefit from the same arguments advanced on behalf of the Estate, as he did as Estate Trustee, I am of the view that the claim for extra work is not justified in these circumstances and that Ronald is amply compensated by the Trustee compensation to be recalculated.

[33] Legal fees in the amount of $5,000.00 are claimed for the passing of the accounts. The amount that is fair and reasonable in the circumstances is $2,500.00 and should be paid out of the Estate.

[34] Ronald has requested his costs of the repayment application in the amount of $5,000.00 in addition to the costs requested for the other applications. The amount that is fair and reasonable in the circumstances is $2,500.00 and should be paid by Larrie.

[35] The recalculation of the Trustee compensation should be submitted to me in affidavit form through Judges Administration at 361 University Avenue. The plaintiff should also submit a new calculation of the net amount to be paid to Ronald by Larrie, taking into account Larrie s share of the repayment of the rental revenues and of the Estate s revised expenses, and Larrie s sole responsibility for costs and other amounts, as set out in this Endorsement.

[36] As Larrie did not appear on the hearing of the applications, I dispense with the necessity of obtaining his approval of the draft order, which should be submitted to me for review and signature, although Larrie should be served with a copy of this Endorsement and of the order once it is issued and entered.

Roberts, J.

DATE: 2007/12/03

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Ronald William Rudling, Estate Trustee With a Will of the Estate of Pauline Rudling

Plaintiff

- and -

Larrie Michael Rudling

Defendant

REASONS FOR JUDGMENT

MOORE J.

Released: 3 December 2007