CBA L.@.W. SERIES

Session II: "Across the Country in 90 Minutes"

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Wills, Estates & Trusts: Newfoundland Perspective

By: Paul Coxworthy

Stewart McKelvey

Newfoundland Labrador Outline

- Recent Cases in NL: a “strict” compliance with Will formalities jurisdiction
- Probate and the missing original Will
- When will a signed handwritten document, expressing testamentary intentions, be admissible into probate?
- Conclusions

RE: Estate of James Hodder Hussey, 2012 CanLII 31193 and 63468 NL SCTD

- A "missing" original Will – only an unexecuted office copy is found
- There is no substantial compliance provision in the NL *Wills Act* (contrast with, e.g., s. 23 Manitoba *Wills Act* and s. 34 Saskatchewan *Wills Act*)
- Can the unexecuted copy be admitted into probate?
- Potentially "Yes" – the solicitor who drafted the Will proffered to the Court a proof of will, attesting to due execution of the lost original Will, conforming with the unexecuted copy, 14 years before
- *Omnia praesumuntur rita acta*: all acts are presumed to have been done rightly and regularly

Related Citation:

http://www.canlii.org/en/nl/nlsctd/doc/2012/2012canlii31193/2012canlii31193.html

RE: Estate of James Hodder Hussey (cont'd)

- But this "benevolent presumption" is displaced
- After the proof of will is made, the original 2nd page (not the execution page) of the Will is found with other papers of the deceased. There is no indication of what happened to the other pages
- The found page bears the initials of the deceased and the solicitor, but the initials of the 2nd witness are different from those of the 2nd witness identified in the solicitor's proof of will
- The solicitor is unable to recollect the name or identity of the 2nd witness, but maintains the Will would have been duly executed

RE: Estate of James Hodder Hussey (cont'd)

- The Court did not accept the solicitor's testimony as "direct affirmative evidence of due execution", as it was reconstructed from the solicitor's circumstances at the time and not from direct memory of what happened (14 years before) and as it was weakened by the previous, inconsistent proof of will

- Moreover, the Court found that the presumption that a lost Will, last known to be in the testator's possession, had been destroyed by the testator as an act of revocation, was supported by the found original 2nd page of the Will

- The found original 2nd page of the Will was not torn or otherwise mutilated, other than that the testator had written some notes on it (which notes did not indicate any change in his testamentary intentions)

Polling Question: *RE: Estate of James Hodder Hussey* (cont'd)

- Would the result have been different if the solicitor had not made the previous, inconsistent proof of will (i.e. even if he was still unable to identify the 2nd witness)?
  - Yes
  - No

Polling Question: *RE: Estate of James Hodder Hussey* (cont'd)

- Would the result have been different if the solicitor had given a proof of will fully consistent with the found original 2nd page of the Will, i.e. if he had been able to identify the 2nd witness? Would the Court have still held that the found original 2nd page of the Will was evidence of an act of revocation by the testator?
  - Yes
  - No

Polling Question: *RE: Estate of James Hodder Hussey* (cont'd)

- Would the result have been different in a jurisdiction with "substantial compliance" wills legislation?
  - Yes
  - No

Estate of Sonya Lyttle, 2013 CanLII 84273 NL SCTD

- Are 5 pages of handwritten notes, dated on the 1st page and signed on the last page by the testatrix, and found with a copy of her previously executed Will, a valid testamentary instrument?

- The Court noted that "The case law in this province dealing with revoking or changing wills by subsequent writing is ambivalent."

- The Court cited a 1973 NL decision admitting into probate, as a holograph codicil, a testator's handwritten letter to his solicitor, setting out the changes he wanted to make to his previously executed Will; and also cited a similar-fact 1993 NL decision with the same result, and a similar-fact 1992 NL with the contrary result

Related Citation:

http://www.canlii.org/en/nl/nlsctd/doc/2013/2013canlii84273/2013canlii84273.html

Estate of Sonya Lyttle (cont'd)

- Ms. Lyttle's notes were not addressed to her solicitor, or to anyone
- The 5 pages of notes were headed "Notes for Will", but the Court agreed that this did not determine the issue
- The Court expressed the view that the notes were "generally ambivalent" about the testatrix's intentions, in some respects clearly expressing her disposing intention, and in other respects seeming undecided or non-committal
- The Court declined to "cobble together" a will for the testatrix, finding that the handwritten notes did not have disposing effect

Rule 56.18 of the NL Rules of the Supreme Court

- In the *Hussey* case, the Court specifically stated that the petitioner acted appropriately by seeking to have the unexecuted copy of the original Will admitted into probate

- Similarly, in the *Lyttle* case, the Court held that the petitioner acted appropriately by producing the handwritten notes to the Court, to determine their validity as a testamentary instrument, and effect if any on the testatrix's Will

- In *Hussey*, costs were awarded to the petitioner, and all intervening parties, on a solicitor-and-client basis (higher level of recovery). In *Hussey,* the Court expressly found that the testator was largely at fault for failing to ensure that a valid will was available for probate. In *Lyttle*, only party-and-party costs were awarded

Rule 56.18 of the NL Rules of the Supreme Court (cont'd)

- **Rule 56.18 of the NL Rules of the Supreme Court:**

  If a will contains a reference to, or if an applicant has any knowledge of, any paper, deed, memorandum or other document of such a nature as to raise a question whether it ought or ought not to form a constituent part of the will, the deed, paper, memorandum or other document shall be produced with a view to ascertaining whether it is entitled to probate, and if it cannot be produced, its non-production must be accounted for.

- While Rule 56.18 was not cited in either the *Hussey* or *Lyttle* decisions, it may be interpreted, particularly in light of *Hussey* and *Lyttle,* as placing a high onus on a petitioner to produce notes and other documents found in association with the Will, even when not clothed in the requirements of a valid testamentary instrument

Polling Questions:

- Does a solicitor have the responsibility to impress upon the testator

  - The need to ensure that the original Will is preserved and can be found after the testator dies?

    - Yes
    - No

  - The risks, in respect of creating testamentary uncertainty and dissipation of the estate in legal costs, of the testator making notes and other documents that may be associated with the Will?

    - Yes
    - No

Polling Question:

- Is the solicitor potentially liable to beneficiaries of an estate which is substantially dissipated by litigation arising, if no steps are taken to impress upon a testator the foregoing risks?
  - Yes
  - No

Conclusion - The Solicitor's Responsibilities

- **Lessons to be taken from the *Hussey* and *Lyttle:***
  - Impress on clients that a DIY approach to amending the testamentary intention expressed in a Will is fraught with risks
  - Advise the executor/Will proponent on the obligation to produce documents or notes which could form a constituent part of a Will
  - In the absence of clear recollection or a reliable record, do not make a proof of Will based on "usual practice"