COURT OF APPEAL FOR ONTARIO

CITATION: Dhingra v. Dhingra, 2012 ONCA 261
DATE: 20120424
DOCKET: C53965

Rosenberg, Cronk and Watt JJ.A.

BETWEEN

Ved Parkash Dhingra

Applicant (Appellant)

and

Paul (Vikas) Dhingra acting as Estate Administrator of
the Estate of Kamlesh Kumari Dhingra

Respondent (Respondent in Appeal)

Eric M. Wolfman, for the appellant

Vito Scalisi, for the respondent

Heard: December 7, 2011

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice dated June 16, 2011, with reasons reported at 2011 ONSC 3741.

Rosenberg J.A.:

[1] This appeal concerns the rule of public policy that a person who kills another cannot share in the deceased's estate. The principal issue in this appeal is whether that rule applies where the beneficiary, in this case of an insurance policy, was found not criminally responsible on account of mental disorder in the death of the deceased. A second issue is the role played by the *Civil Remedies*

Act, 2001, S.O. 2001, c. 28. The application judge Pollak J. held that the public policy rule applied.

[2] For the following reasons, I would allow the appeal.

THE FACTS

[3] In 1998, the appellant took out a group life insurance policy in the amount of $51,000. His wife was named as the beneficiary. Under the policy, his wife was also an insured and the appellant the beneficiary. The appellant had been suffering from a serious mental disorder for many years. According to the respondent, the appellant's son, the appellant and his wife had been separated since 1992.

[4] In 2006, the appellant killed his wife. He was tried on a charge of second degree murder and in 2008, he was found not criminally responsible on account of mental disorder. At that time, the appellant was 66 years of age. The Ontario Review Board ordered that the appellant be held in a medium-secure facility at Whitby Mental Health Centre. As a result of a subsequent order of the Board, the appellant was granted a conditional discharge and is now living in the community.

[5] In May 2007, the respondent, acting on a Power of Attorney, submitted an Accidental Death Claim application claiming the proceeds of the insurance policy on behalf of the appellant. The insurer, Scotia Life, approved payment of the

insurance proceeds to the appellant but did not immediately pay out the proceeds of the policy. After the criminal trial, the respondent, now acting as administrator of his mother's estate, requested that the proceeds should be paid to the estate.

[6] In view of the conflicting claims, Scotia Life brought an application pursuant to s. 320 of the *Insurance Act*, R.S.O. 1990, c. I.8, to pay the proceeds of the policy into court. In 2009, an order was granted requiring Scotia Life to deposit the insurance proceeds into court. The appellant then brought an application to have the proceeds paid to him.

REASONS OF THE APPLICATION JUDGE

[7] The application judge held that the law in Canada is as set out in *Ontario Municipal Employees Retirement Board v. Young,* (1985), 49 O.R. (2d) 78 (H.C.J.). She interpreted that decision as holding that the rule in some United States jurisdictions that the public policy rule only applies in the case of an intentional killing was not the law in Canada. She referred to the following passage from p. 81 of the *Young* reasons:

> These cases have been consistently followed by the Canadian Courts with one exception, in the case of a careless driving conviction to which I will be referring. There appear to be numerous American decisions that state that the rule of public policy prohibiting a person from benefiting from his own criminal act is only applicable if the killing is intentional. **Were I not bound by the English and Canadian decisions I would, in this case, have favoured following the American**

> **decisions and found in favour of Therese Vezina Young. She did not intend to kill her husband. He would have died shortly in any event and she would have had the benefit of the pension. However, in my view, the law is clear and she is not entitled to benefit.** [Emphasis added by application judge.]

[8] The application judge held as follows:

> *Although the Applicant attempts to distinguish the Canadian jurisprudence relied on by Paul, and both parties submit that there is no jurisprudence directly on point, I find that the court's finding referred to above, is clear that the American jurisprudence is not applicable in Canada. Further, I agree with the Estate, that the law in Canada does not support the Applicant's submission that the public policy rule does not apply in this case.* The Applicant committed second degree murder of his ex-wife Kamlesh. Even though he was found not criminally responsible, he still physically committed the crime. There is no judicial support in Canada for the Applicant's submission that this Court ought to require a finding of intent to commit the crime in order to apply the public policy rule. [Emphasis added.]

[9] The application judge also referred to s. 17 of the *Civil Remedies Act* but did not find it necessary to consider that provision. I will return to the *Civil Remedies Act* later in these reasons.

[10] The application judge therefore dismissed the appellant's application to have the funds held in court paid out to him. She did not, however, make an order for the disposition of the funds. Thus, the funds remain held in court. The application judge ordered that the appellant pay the respondent's costs, fixed at $7,127.78.

POSITIONS OF THE PARTIES

[11] The appellant submits that the public policy rule[1] does not apply to a beneficiary who was found not criminally responsible on account of mental disorder. Even if the appellant were not entitled to the funds, the wife's estate would have no claim to the insurance proceeds as it is not a named beneficiary in the event of the wife's death. The appellant also submits that, in any event, costs should not have been awarded against him.

[12] The respondent takes the position that the application judge properly held that the proceeds of the insurance policy should not be paid to the appellant in accordance with the public policy rule. He accepts that the estate is not entitled to the proceeds. He submits that the proceeds should be forfeited to the Crown pursuant to the *Civil Remedies Act*.

ANALYSIS

The Public Policy Rule

[13] Decisions from the Supreme Court of Canada have provided various descriptions of the public policy rule. For example:

[14] *Oldfield v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 22, [2002] 1 S.C.R. 742, at para. 11:

> The public policy rule at issue is that a criminal should not be permitted to profit from crime. Unless modified by

[1] In these reasons, I will refer to the rule preventing a person from profiting from his or her own crime as the public policy role or the forfeiture rule.

> statute, public policy operates independently of the rules of contract. For example, courts will not permit a husband *who kills his spouse to obtain her life insurance proceeds*, regardless of the manner in which the life insurance contract was worded. As Ferguson J. held in the court below, public policy "applies regardless of the policy wording -- it is imposed because of the courts' view of social values" (p. 119). [Emphasis added.]

[15] *Brissette Estate v. Westbury Life Insurance Co.; Brissette Estate v. Crown Life Insurance Co.,* [1992] 3 S.C.R. 87, at p. 94:

> The rationale of the policy which denies recovery to the felonious beneficiary is that a person should not profit from his or her own criminal act. It is consistent with this policy *that a person should not be allowed to insure against his or her own criminal act* irrespective of the ultimate payee of the proceeds. [Emphasis added.]

[16] *Lundy v. Lundy* (1895), 24 S.C.R. 650, at pp. 652-53:

> I cannot agree in the conclusion of the Court of Appeal, nor in the reasoning by which that conclusion was arrived at. The reasoning of the court would seem to me rather to apply to a case of justifiable or excusable homicide than to a case of manslaughter. The principle upon which the devisee is held incapable of taking under the will of the person he kills is, that no one can take advantage of his own wrong. *Then surely an act for which a man is convicted of manslaughter and sentenced to a long term of imprisonment was a wrongful, illegal and formerly (when felonies were recognized as forming a particular class of offences) a felonious act*. I can see no principle on which to rest the decision of the Court of Appeal, and I can find no authority in support of it. On the contrary, the case of *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, proceeds upon reasons which admit of no such distinction as has been made by the judgment appealed against in the present case. That

> was itself a case of murder, but the Lord Justices lay no stress on the crime being a premeditated one, and indeed Lord Justice Fry uses language which indicates, as the ground of his decision, a principle which would include all wrongful acts, not merely felonies but misdemeanours, and this sound principle of universal jurisprudence the Lord Justice states in the following language:
>
> > No system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour.
>
> [Emphasis added.]

[17] None of these cases deals with the issue here: whether the rule of public policy applies to a person found not criminally responsible on account of mental disorder. On the other hand, there is at least one decision from the Supreme Court of Canada that seems to hold that the rule does not apply where the person was insane at the time of the killing. In *Nordstrom v. Baumann*, [1962] S.C.R. 147, the deceased husband died in the course of a fire set by his wife. It does not appear that the wife was ever tried for the killing. At the time of the proceedings she was being held at the Provincial Hospital for the insane. The issue in *Nordstrom* was whether the wife was entitled to share in the estate of her deceased husband. The application judge had held that she could on the basis that she would have been found insane as defined in former s. 16 of the *Criminal Code*, R.S.C. 1985, c. C-46. The appeal by the wife concerned procedural

issues. The cross-appeal by the administrator of the husband's estate, however, directly challenged the application judge's finding that the wife was insane within the meaning of s. 16.

[18] Speaking for the court on the cross-appeal, Ritchie J. at p. 154 appeared to accept that the rule of public policy did not apply if the wife was properly found to be insane:

> The real issue before the trial judge was whether or not, when she set this fire, the appellant was insane to such an extent as to relieve her of the taint of criminality which both counsel agreed would otherwise have precluded her from sharing in her husband's estate under the rule of public policy exemplified in such cases *as Lundy v. Lundy* [(1895), 24 S.C.R. 650], *The London Life Insurance Company v. Trustees of Lang Shirt Company Limited et al*. [[1929] S.C.R. 117, 1 D.L.R. 328], *In the Estate of Crippen* [[1911] P. 108, 80 L.J.P. 47] and *Cleaver v. Mutual Reserve Fund Life Association* [[1892] 1 Q.B. 147, 61 L.J.Q.B. 128].

[19] The court allowed the wife's appeal and dismissed the cross-appeal with the result that the wife was entitled to a share of her husband's estate in view of the application judge's finding of fact that she was insane.

[20] The exception from the public policy rule in cases of insanity was also recognized by Estey C.J.H.C. in *Re Dreger* (1976), 12 O.R. (2d) 371, at p. 377:

> The next issue which arises at this stage of these proceedings is whether or not the husband, having killed his wife, can succeed to any benefits under her will. It has, of course, for many years been contrary to public policy that any person should be allowed to benefit from his own crime. Applied to the

> circumstances of the transmission of property, a beneficiary under this rule of public policy cannot receive property under the will: *Lundy et al. v. Lundy* (1895), 24 S.C.R. 650. This principle of law was recently discussed in this Court in *Re Gore*, [1972] 1 O.R. 550, 23 D.L.R. (3d) 534. *The only exception to this rule is that a person of unsound mind is not so disqualified from receiving a benefit under the will of a person he has killed while in law insane*: *Re Estate of Maude Mason* (1916), 31 D.L.R. 305, [1917] 1 W.W.R. 329, 23 B.C.R. 329 (B.C.S.C.); *Re Pitts; Cox v. Kilsby*, [1931] 1 Ch. 546; *Re Houghton; Houghton v. Houghton*, [1915] 2 Ch. 173. [Emphasis added.]

[21] *Re Dreger* was a case of murder/suicide, and Estey C.J.H.C. held that those attempting to claim through the husband had not established that he was insane at the time he killed his wife. Accordingly, the public policy rule applied and their claim was dismissed.

[22] In my view, the public policy rule is as set out in *Nordstrom* and *Re Dreger* and the person who is not guilty by reason of insanity, now termed not criminally responsible on account of mental disorder, is not prevented from taking under an insurance policy. The only question, then, is whether the rule of public policy can be said to have been varied because of the intervention by the legislature through the *Civil Remedies Act*. I will deal with that particular issue later. At this point, I simply state my view that I can see no reason not to apply *Nordstrom* and *Re Dreger*. To the contrary, developments since 1976 have only strengthened the policy basis for making an exception for persons found not criminally responsible.

[23] In *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, the court was required to consider the constitutionality of the new Part XX.1 of the *Criminal Code* that was enacted in the wake of the Supreme Court of Canada's holding in *R. v. Swain*, [1991] 1 S.C.R. 933, that the former *Criminal Code* provisions dealing with mentally ill offenders were unconstitutional. As part of its revision of the *Criminal Code*, Parliament also amended s. 16 to eliminate the insanity defence, replacing it with the concept of not criminally responsible on account of mental disorder. Where the person meets this definition, he or she is found not criminally responsible on account of mental disorder ("NCR"), pursuant to s. 672.34 of the *Criminal Code.* In *Winko* at para. 20, McLachlin J. described the purpose of the new provisions:

> Part XX.1 reflected an entirely new approach to the problem of the mentally ill offender, based on a growing appreciation that treating mentally ill offenders like other offenders failed to address properly the interests of either the offenders or the public. *The mentally ill offender who is imprisoned and denied treatment is ill-served by being punished for an offence for which he or she should not in fairness be held morally responsible.* At the same time, the public facing the unconditional release of the untreated mentally ill offender was equally ill-served. To achieve the twin goals of fair treatment and public safety, a new approach was required. [Emphasis added.]

[24] It seems to me that if a person found not criminally responsible on account of mental disorder is not "morally responsible" for his or her act, there is no rationale for applying the rule of public policy. That rule is founded in the theory

that people should not profit from their crimes or, more broadly, by their own wrongs. Section 16 and Part XX.1 of the *Criminal Code* deny that the NCR accused has committed a crime or can be held legally responsible for any wrongdoing. It was an error for the application judge to describe the appellant as having "committed second degree murder". Further in *Winko*, at para. 42, McLachlin J. makes the point that the NCR accused is not to be punished; rather, "Parliament has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation."

[25] The approach in other common law countries is generally to exempt persons with a mental disorder that would give rise to an insanity defence from the effect of the public policy rule. For example, in the United States, those states that have adopted § 2-803 of the *Uniform Probate Code* would exempt persons who are not "criminally accountable for the felonious and intentional killing of the decedent". Most so-called "slayer statutes" similarly exempt the insane beneficiary from operation of the public policy rule: see Laurel Sevier, "Kooky Collects: How the Conflict Between Law and Psychiatry Grants Inheritance Rights to California's Mentally Ill Slayers" (2007) 47 Santa Clara L. Rev. 379; and Gary Schuman, "Life Insurance and the Homicidal Beneficiary: The Insurer's Responsibilities Under State Slayer Laws and Statutes" (2001) 51 Fed'n Def. & Corp. Counsel Q. 197.

[26] This same approach is generally followed in other common law jurisdictions such as Australia and New Zealand. In the United Kingdom, the common law would seem to exempt from forfeiture someone who was not guilty of "deliberate, intentional and unlawful violence, or threats of violence": see *R. v. National Insurance Commissioner, ex parte Connor*, [1981] 1 All E.R. 769 (Div. Ct.), at p. 774. Thus, a person found not guilty by reason of insanity would not be subject to the forfeiture rule: see Chris Triggs, "Against Policy: Homicide and Succession to Property" (2005) 68 Sask. L. Rev. 117, at p. 126. In any event, even if the forfeiture rule did apply to an insane accused, the common law has been varied to give the court discretion not to apply the forfeiture rule where "the justice of the case requires the effect of the rule to be so modified"; the court is to consider "the conduct of the offender and of the deceased and ... such other circumstances as appear to the court to be material": see the *Forfeiture Act 1982* (U.K.), 1982, c. 34, s. 2(2).

[27] To conclude, it is my view that the public policy rule does not prevent the appellant from receiving the proceeds of the insurance policy.

The Civil Remedies Act

[28] The *Civil Remedies Act* was proclaimed into force on April 12, 2002. The purposes of the Act are set out in s. 1:

> **1.** The purpose of this Act is to provide civil remedies that will assist in,

> (a) compensating persons who suffer pecuniary or non-pecuniary losses as a result of unlawful activities;
>
> (b) preventing persons who engage in unlawful activities and others from keeping property that was acquired as a result of unlawful activities;
>
> (c) preventing property, including vehicles as defined in Part III.1, from being used to engage in certain unlawful activities; and
>
> (d) preventing injury to the public that may result from conspiracies to engage in unlawful activities.

[29] In the result, s. 3 of the Act provides for the making of an order forfeiting property that is proceeds of unlawful activity on application by the Attorney General to the Superior Court of Justice. “Unlawful activity” is defined in s. 2 of the Act to mean an act or omission that “(a) is an offence under an Act of Canada, Ontario or another province or territory of Canada”. The term “proceeds of unlawful activity” is defined in the same section, in part, as “property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity”. Finally, s. 17(1) provides that “proof that a person was convicted, found guilty or found not criminally responsible on account of mental disorder in respect of an offence is proof that the person committed the offence”.

[30] Importantly, however, the forfeiture order is not automatic. Under s. 3(1), the court is not to make the order forfeiting the property to the Crown “where it would clearly not be in the interests of justice”. Also, the forfeiture provisions of the *Civil Remedies Act* are only triggered on application by the Attorney General.

[31] I accept that the *Civil Remedies Act* is an indication that public policy in Ontario favours preventing persons from profiting from their crimes and that, given the provisions of s. 17, the policy extends to persons found not criminally responsible by reason of mental disorder. In my view, however, the Act does not supplant the common law rule of public policy that does not prevent an NCR accused from taking under an insurance policy or a will. At its highest, the Act indicates that the rule ought not to be applied automatically. The common law rule and the Act serve different functions. The common law rule simply prevents the wrongdoer, however defined, from receiving the proceeds of the insurance policy or the will. In many cases, that would mean that the funds would be available either to a secondary beneficiary in the case of an insurance policy, if one is named, or to other beneficiaries, in the case of a will.

[32] A forfeiture order made under the Act, however, deprives everyone, including other beneficiaries, of the proceeds because the proceeds are forfeited to the Crown. A more compelling expression of public policy would be for the legislature to reverse the effect of the public policy that permits the NCR accused to take under a will or insurance policy by deeming the accused to have predeceased the victim.[2] Such a provision would result in the proceeds usually ending up in the estate of the victim for the benefit of beneficiaries other than the accused.

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[2] See § 524.2-803 of the Minnesota Uniform Probate Code, which provides that the "spouse, heir or devisee who feloniously and intentionally kills" the deceased is not entitled to any benefits under the will and "the estate of the decedent passes as if the killer had predeceased the decedent".

[33] Thus, there are competing public policies. On the one hand, the common law, reinforced by the policy as explained in *Winko*, is that an NCR accused is neither morally nor legally responsible for the death and therefore should be entitled to take under an insurance policy in which he or she is a beneficiary. On the other hand, there is the reflection of the public policy in the Act favouring the view that proceeds of crime in the hands of an NCR accused may be forfeited to the Crown.

[34] In my view, the way to reconcile these competing policies is to allow the common law and the Act to each operate in their own spheres. That the legislature has so recently turned its mind to the question of criminals profiting from their crimes and not sought to wholly abrogate the common law rule suggests to me that the legislature intended to leave the common law rule intact. The legislature has expressed public policy in the province but limited forfeiture to applications made by the Attorney General.[3]

[35] The common law rule does not prevent the appellant from receiving the proceeds of the insurance policy. However, it is open to the Attorney General to bring an application under s. 3 of the Act. I note that s. 4 gives the Attorney General the right to apply for any number of interlocutory orders to safeguard any "property" pending an application under s. 3. If such an application were brought,

[3] See, for example, the approach by the Supreme Court of Canada to deduction of fines and penalties under the *Income Tax Act*, R.S.C. 1985, c.1: see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, especially *per* Iacobucci J., at paras. 59-65.

the court would determine whether it would clearly not be in the interests of justice to forfeit the proceeds to the Crown.

DISPOSITION

[36] Accordingly, I would allow the appeal, set aside the order of the application judge, grant the application and order that the money deposited with the Accountant of the Superior Court of Justice, along with all interest accrued, is rightfully payable to the appellant. The funds are to be paid out to the law firm of Oster Wolfman LLP in trust for the benefit of the appellant.

[37] The Attorney General was given notice of the original application but apparently took no position on the application. I would stay this order for 30 days to give the Attorney General time to consider whether he wishes to apply for an interlocutory order under s. 4 of the *Civil Remedies Act*. I should not be taken as having determined that an application could be made until the property is actually in the hands of the appellant or someone holding the funds on his behalf.

[38] In my view, this is not a case for costs. While I have found that the Supreme Court of Canada decision in *Nordstrom* is controlling, the issue of the impact of the *Civil Remedies Act* is a novel issue. I would set aside the costs order of the

application judge and order that there be no costs of the application or the appeal.

Signed: "M. Rosenberg J.A."
"I agree E. A. Cronk J.A."
"I agree David Watt J.A."

Released: "MR" APRIL 24, 2012