COURT OF APPEAL FOR ONTARIO

CITATION: Holgate v. Sheehan Estate, 2015 ONCA 717
DATE: 20151027
DOCKET: C59988

Cronk, Hourigan and Benotto JJ.A.

BETWEEN

Stephen Craven Holgate and John Edward Holgate

Plaintiffs (Appellants)

and

The Estate of May Sheehan, the Estate of John Holgate, and Jo-Ellen Victoria Buss

Defendants (Respondents)

Ronald Petersen, for the appellants

Paul A. Dancause, for the respondents

Heard: September 21, 2015

On appeal from the orders of Justice Robert Beaudoin of the Superior Court of Justice, dated January 6, 2015 and February 26, 2015, with reasons reported at 2015 ONSC 259, 248 A.C.W.S. (3d) 733 and 2015 ONSC 1213, 250 A.C.W.S. (3d) 180.

Benotto J.A.:

Overview

[1] This appeal concerns the interpretation of the will and codicil of the late John Holgate.

[2] When John Holgate and May Sheehan married, they each had children from previous marriages.[1]

[3] Mr. Holgate, a lawyer and magistrate, made a will and a codicil that provided for Mrs. Holgate to have a life interest in two trusts. After his death, Mrs. Holgate used money from the trusts for her expenses. It is alleged that she also saved money.

[4] When she died in 2012, Mrs. Holgate left the bulk of her estate to her biological children. Mr. Holgate's sons alleged that Mrs. Holgate violated the terms of the trusts by accumulating wealth. They took the position that the life interest she received from their father allowed her to *use* money but not *save* it.

[5] Mr. Holgate's sons brought an action against their father's estate, Mrs. Holgate's estate and Mrs. Holgate's daughter personally. They sought an accounting, a freezing of funds and general damages of $5,000,000. They also sought a declaration that they are entitled to a resulting or constructive trust interest in both estates.

[6] The action proceeded to trial. After three days of evidence, the trial judge indicated that a "critical issue" had to be determined with respect to the interpretation of Mr. Holgate's will and codicil. He invited counsel to bring a mid-trial motion either for determination of an issue under r. 21.01(1)(a) or for

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[1] May Sheehan is referred to as May Holgate or Mrs. Holgate in this decision.

directions under r. 75.06(3), both under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[7] Counsel agreed to bring a r. 21 motion before the trial judge to determine whether the provisions of either trust precluded Mrs. Holgate from accumulating wealth. The question of law (set out below) was drafted and agreed to by counsel.

[8] The trial judge heard the motion and concluded that nothing in the will or codicil prevented Mrs. Holgate from accumulating wealth.

[9] Mr. Holgate's sons appeal on two grounds:

1. The trial judge erred in his interpretation of the trusts; and
2. The trial judge had no jurisdiction to hear a r. 21 motion during the trial and further, by doing so, erred in considering evidence from the trial.

[10] Mr. Holgate's sons also seek leave to appeal the trial judge's award of costs. They submit that costs should have been paid by the estate and in the alternative, that the costs award is excessive.

[11] I agree with the trial judge's interpretation of the provisions of the will and codicil. I do not accept that he lacked jurisdiction to conduct the r. 21 motion. Further, I see no reason to interfere with the costs order.

Interpretation of the Trusts

[12] The will and codicil established two trusts: the "Holgate Trust" and the "U.K. Trust." Mrs. Holgate and Robert Joseph Irving (Mr. Holgate's solicitor) were appointed trustees.

[13] The Holgate Trust provided as follows:

> To hold and keep invested the residue of my estate or the amount thereof remaining for the sole use and benefit of my wife, MAY HOLGATE, during her lifetime, with power and authority to my Trustee to draw on both the income and the capital of my estate for the care and support of my said wife, as my Trustee in their discretion considers advisable. In availing themselves of this discretionary power to encroach on the capital of my estate for my wife's benefit, it is my strong wish and desire that at all times my Trustee's first consideration shall be my wife's well-being and comfort and that all her needs and requirements of every kind shall be provided for adequately in all respects out of my estate, as I do not feel that my estate need be largely conserved for the future use of my children and step-children. I therefore authorize and empower my Trustee to be generous in the exercise of this discretionary authority, even though there may be a considerable, or if necessary, total depletion of the capital of my estate by reason of such encroachments. [Emphasis added.]

[14] The U.K. Trust provided as follows:

> To hold all my interest in real and personal property situated in the United Kingdom for the sole use and benefit of my wife MAY HOLGATE, during her lifetime, with power and authority to my Trustee to draw on the income, (but not the capital) of the said real and personal property for the use and benefit of my said wife, and on her death to pay or transfer to such of my

> sons, JOHN EDWARD HOLGATE and STEPHEN CRAVEN HOLGATE, who shall survive me, and if more than one (1) in equal shares between them, whatever interest I may have in the said real and personal property, both income remaining and capital. [Emphasis added.]

[15] The foundation of the appellants' submission is based on the word "use." They submit that, with respect to both trusts, Mrs. Holgate was entitled to "use" the money. In that regard, they acknowledge there were no limitations. However, they argue that, by saving money, Mrs. Holgate was not using it. They submit that the purpose of the life interest was to preserve capital for the remainder beneficiaries. Otherwise, there would be an absolute gift.

[16] Dealing first with the Holgate Trust, the trial judge concluded that Mr. Holgate's intention was clear – there was no restriction on Mrs. Holgate's ability to save money. The will stipulated that she have "all her needs and requirements of every kind" provided for "adequately" and "in all respects" out of the estate. It also stipulated that the estate did not need to be conserved for Mr. Holgate's children and step-children. A considerable or total depletion of the capital of the estate was contemplated.

[17] The will contained no limitations on the use of income, no requirement to recapitalize unused income, and no requirement for Mrs. Holgate to look to her own resources before accessing trust income. The language of the will,

according to the trial judge, came as close as possible to conferring an absolute gift on Mrs. Holgate of the entire residue.

[18] Turning to the U.K. Trust, the trial judge concluded that there were no limitations placed on the use of the assets. He determined that the codicil demonstrated Mr. Holgate's wish to provide his widow with enough funds for her lifetime. Significantly, the codicil revoked a prior provision of the will that made a gift of the U.K. assets to his sons.

[19] I agree with the interpretation of the trial judge. It has long been the case that "[t]he golden rule in interpreting wills is to give effect to the testator's intention as ascertained from the language that was used": see *Dice v. Dice Estate*, 2012 ONCA 468, 111 O.R. (3d) 407, at para. 36. Both trusts indicate an intention that there be no limitation on the discretion of the trustees to draw on income or (in the case of the Holgate Trust) to encroach on capital, and that there be no prohibition on accumulating funds.

[20] In the Holgate Trust, the words "care and support" and "well-being and comfort" appear in the context of the following phrases used by Mr. Holgate:

- "for the sole use and benefit of my wife";
- "power and authority to my Trustee to draw on both the income and the capital of my estate for the care and support of my said wife, as my Trustee in their *(sic)* discretion considers advisable";

- “it is my strong wish and desire that at all times my Trustee’s first consideration shall be my wife’s well-being and comfort and that all her needs and requirements of every kind shall be provided for adequately in all respects out of my estate”;
- “I do not feel that my estate need be largely conserved for the future use of my children and step-children”; and
- “I therefore authorize and empower my Trustee to be generous in the exercise of this discretionary authority, even though there may be a considerable, or if necessary, total depletion of the capital of my estate by reason of such encroachments”.

[21] These words and phrases indicate a clear intention on Mr. Holgate’s part to allow his wife unrestricted access to the funds. Likewise in the U.K. Trust, there are no words of limitation regarding access to and use of income; the trustees are empowered to draw on the income of the estate for the use and benefit of Mrs. Holgate.

[22] The appellants submit the trial judge failed to distinguish between Mrs. Holgate’s roles as beneficiary and trustee. This matter was not an interpretive issue before the court in accordance with the agreed upon question of law, which read:

> Having regard to the totality of the wording of the last Will and Testament of John Holgate, dated November

> 20, 1991 and the codicil of John Holgate dated July 24, 1992; and in particular, paragraph 3(c)(iii) of the Will as prescribed in the codicil and paragraph 3(d) of the Will, do the words of the Will of John Holgate preclude his widow the late May Holgate (Sheehan) from accumulating wealth in her own name from the two trusts created by the Will?

[23] The only issue before the trial judge was the interpretation of the will and codicil. The accounting issues, if any, are matters for trial, which – regrettably – has not yet taken place.

Jurisdiction: The Rule 21 Motion

[24] The appellants submit that the trial judge had no jurisdiction to hear the mid-trial motion because r. 21 provides that the motion is to be brought "before trial" and because no evidence was admissible on the motion.

[25] I deal first with the timing of the motion. The trial judge appears to have raised the possibility of a mid-trial motion on his own initiative. He referred to the provisions of r. 1.04(1), which direct the court to secure "the most expeditious and least expensive determination" of the issues in the case.

[26] The appellants consented to the process without objection about the timing. They also participated in the drafting of the question to be answered. Insofar as the result was not what they hoped for, they cannot now claim lack of jurisdiction: see *Harris v. Leikin Group Inc*., 2014 ONCA 479, 120 O.R. (3d) 508,

at para. 53. Given the consent of all counsel and the provisions of r. 1, there was no lack of jurisdiction.

[27] The appellants also submit that the trial judge improperly relied on assertions made by the respondents when interpreting the will. I do not agree. The trial judge made it clear that he attributed the information to the parties but grounded his decision on the wording of the will and codicil, not on the evidence at trial.

[28] The issues raised by the appellants – albeit unsuccessfully – demonstrate the challenges and potential pitfalls involved when a r. 21 motion is entertained by a trial judge.

[29] In this case, the trial judge's initiative in inviting a mid-trial r. 21 motion was clearly designed to narrow the issues and streamline the trial. These objectives are commendable. Unfortunately, however, the initiative produced the opposite result. The mid-trial motion resulted in a bifurcated trial, created the possibility for two appeals to this court arising from the same proceeding, and caused the completion of the trial to be delayed pending the outcome of this appeal.

[30] There is an additional concern. A r. 21 motion concerning a question of law is based on the pleadings. Evidence is not admissible except on consent or with leave of the court. When a r. 21 motion is conducted by a trial judge after the evidentiary phase of the trial has commenced, there is a risk that incomplete

or untested evidence can inadvertently seep – or be seen to seep – into the consideration of the motion on its merits. While I am satisfied that this did not occur in this case, the danger is nonetheless real.

[31] For these reasons, the preferable procedure for the trial judge would have been to determine the question of law at the conclusion of the trial, based on all the evidence and submissions, and address the issue in the reasons for judgment for the trial as a whole.

Costs of the Motion

[32] I would grant leave to appeal costs, but dismiss the appeal as to costs. I see no reason to interfere with the motion judge's discretionary decision that the appellants pay the costs of the motion as opposed to the estate. Nor do I see a reason to interfere with the quantum of costs ordered. The trial judge's costs ruling is neither plainly wrong nor tainted by an error in principle.

Disposition

[33] For the reasons given, I would dismiss the appeal. I would award the costs of the appeal to the respondents, fixed in the amount of $8,500, inclusive of disbursements and HST.

Released: October 27, 2015

"M.L. Benotto J.A."
"I agree E.A. Cronk J.A."
"I agree C.W. Hourigan J.A."