COURT OF APPEAL FOR ONTARIO

CITATION: McGrath v. Joy, 2023 ONCA 46
DATE: 20230125
DOCKET: M53377 (C68977)

Gillese, Trotter and Nordheimer JJ.A.

In the Estate of Joseph Philip Joy, deceased

BETWEEN

Michael Ronald McGrath

Applicant

(Appellant/Responding Party)

and

Joanne Joy, Dexter Ramsundarsingh, and Michael McGrath Jr. by his litigation guardian, The Office of the Children's Lawyer

Respondents

(Respondents/Moving Party)

Orie Niedzviecki, for the moving party Dexter Ramsundarsingh

Kavina P. Nagrani, for the responding party Michael Ronald McGrath

Heard: in writing

REASONS FOR DECISION

[1] Dexter Ramsundarsingh brings a motion for the rehearing of a matter decided by this court in *McGrath v. Joy*[1] (the "Motion"). For the reasons that follow, the Motion is dismissed.

BACKGROUND IN BRIEF

[2] Joseph Philip Joy died by suicide on July 13, 2019. He left a signed two-page note, wholly in his own handwriting, in the pocket of his shorts (the "Suicide Note"). Mr. Joy spent the prior day drinking alcohol and smoking hash oil cigarettes. He had made two wills previously: one in 2014 and another in 2016.

[3] Michael Ronald McGrath is Mr. Joy's stepson and one of two named beneficiaries in the Suicide Note. He brought an application to have the Suicide Note declared Mr. Joy's valid will and admitted to probate (the "Application"). He is the responding party to the Motion.

[4] Mr. Ramsundarsingh was a beneficiary under the 2016 will. Under its terms, he was to receive Mr. Joy's shares in two corporations. Mr. Ramsundarsingh, along with Mr. Joy's wife, opposed the Application on the basis that Mr. McGrath had failed to prove that Mr. Joy had testamentary capacity to make a will when he wrote the Suicide Note. Mr. Ramsundarsingh also took the position that, if the

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Suicide Note was valid, it should be considered to be a codicil to the 2016 will and not affect his inheritance.

[5] The application judge noted that there was no dispute that the Suicide Note met the requirements in s. 6 of the *Succession Law Reform Act,* R.S.O. 1990, c. S.26 (the "*SLRA*"), for a valid holographic will – the only issue was whether Mr. Joy had testamentary capacity to make a will when he wrote the Suicide Note. Based largely on Mr. Joy's consumption of alcohol and drugs the day before his death, the application judge held that Mr. McGrath, as the propounder of the will, had not met the evidentiary burden of establishing Mr. Joy's testamentary capacity when he wrote the Suicide Note and dismissed the Application. Consequently, the application judge said, it was not necessary that he consider Mr. Ramsundarsingh's alternate submission that the Suicide Note should be considered a codicil to the 2016 will.

[6] Mr. McGrath appealed to this court. He raised two issues: did the application judge err in (1) determining that Mr. Joy lacked testamentary capacity when he wrote the Suicide Note and (2) his costs orders.

[7] In his written submissions on the appeal, Mr. Ramsundarsingh argued that, if the Suicide Note were found to be valid, it was "more correctly characterized" as a codicil to the 2016 will. At the oral hearing of the appeal, counsel for

Mr. Ramsundarsingh argued the point and answered questions the court put to him on the matter.

[8] This court allowed the appeal. It concluded that Mr. Joy had testamentary capacity because he had a “sound disposing mind” when he wrote the Suicide Note: he understood the nature and effect of a will; he recollected the nature and extent of his property; he understood the extent of what he was giving under the will; and, he understood the nature of the claims that might be brought by a person excluded from the will.

[9] Despite no cross-appeal having been brought on the matter of whether the Suicide Note was a codicil to the 2016 will, the court expressly addressed the matter at paras. 86-89 of our reasons. We rejected Mr. Ramsundarsingh’s submission on the matter because we had found the Suicide Note to be Mr. Joy’s valid will and Mr. Ramsundarsingh had provided no legal authority to support the proposition that a document the court found to be a person’s valid will should be construed instead as a codicil. In any event, as we stated in our reasons, to accede to such a submission would result in the maladministration of Mr. Joy’s estate because the Suicide Note provided that “everything” Mr. Joy owned was to go to Mr. McGrath and his son.

[10] Before an order reflecting the court’s decision had been taken out, Mr. Ramsundarsingh brought this Motion, asking the court to re-open the appeal

and re-hear submissions on whether the Suicide Note is a codicil to the 2016 will, rather than Mr. Joy's will. He acknowledged that he had taken the position on the appeal that the Suicide Note could be a codicil and was "obviously not intending to disinherit [Mr. Ramsundarsingh]" but did so without reference to statute and case law supporting his position. He also contends that para. 88 of the reasons implies there is no legal authority for a testator to create a handwritten codicil and, thus, has thrown this area of law into disarray.

ANALYSIS

Jurisdiction to Reconsider

[11] As the moving party, Mr. Ramsundarsingh submits that this court has jurisdiction to reconsider its decision before a formal order is issued based on rr. 37.14(6) and 59.06(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. However, neither rule applies.

[12] Rule 37.14(6) has no application because it applies only to motions to set aside an order made by this court (or the Divisional Court). No order has yet been taken out.

[13] The moving party's reliance on r. 59.06(2) is also misplaced. Rule 59.06(1) addresses the court's power to amend an "order" that contains "an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate". Rule 59.06(2) allows a party to move to have

an order set aside or varied, among other things. Again, however, no order has yet been taken out in this case.

[14] Nonetheless, this court has jurisdiction to reconsider its decision before a formal order has been taken out because the court is not *functus officio*. See, for example, *Pastore v. Aviva Canada Inc*., 2012 ONCA 887, 300 O.A.C. 355, at para. 9; *Mujagic v. Kamps,* 2015 ONCA 360, 125 O.R. (3d) 715, at para. 5, leave to appeal refused, [2015] S.C.C.A. No. 330; *Meridian Credit Union Limited v. Baig,* 2016 ONCA 942*,* at para. 7; and, *First Elgin Mills Developments Inc. v. Romandale Farms Limited*, 2015 ONCA 54, 381 D.L.R. (4th) 114, at para. 7.

The Test to be Met

[15] The party seeking to re-open an appeal after the appeal decision has been rendered faces a "high hurdle": *Meridian*, at para. 7. The court will re-open an appeal prior to the entering of the order only in the rare circumstance where it is in the interests of justice to withdraw the reasons of the court and re-hear the case on the merits: *First Elgin Mills*, at para. 7, citing *Pastore*, at para. 9.

The Merits of the Motion

[16] The moving party has not raised the kind of "rare circumstance" where the interests of justice would require the court to withdraw our reasons and re-hear the issue of whether the Suicide Note was Mr. Joy's final will or a codicil to his 2016 will. The moving party identified and argued this matter on the appeal, both in his

written materials and in oral argument. The court expressly addressed the matter in our reasons. The fact that the moving party disagrees with this court's decision on that matter or wishes to advance further arguments is not a "rare circumstance".

[17] Further, it would not be in the interests of justice, in this case, to permit the matter to be re-argued. While the moving party argues that para. 88 of the court's reasons can be read as implying that, pursuant to s. 6 of the *SLRA*, a testator cannot make a holograph codicil, we disagree. Paragraph 88 does not say that. Moreover, read in context, we do not see that to be a permissible implication of the impugned sentence in para. 88. When addressing whether the Suicide Note was more correctly characterized as a codicil, the court had already determined that the Suicide Note was Mr. Joy's valid will. Having left "everything" to two named beneficiaries by means of the Suicide Note, the court did not accept that the Suicide Note could be construed as a codicil to the 2016 will. That does not mean that a document could never be construed to be a codicil pursuant to s. 6 of the *SLRA*. It simply means what it says: having found the Suicide Note to be Mr. Joy's valid (holograph) will, we did not accept that it could be characterized as a codicil to the 2016 will.

Procedural Points

[18] Two procedural points are worthy of note.

[19] First, in the ordinary course, a motion to re-open an appeal is heard by the panel that heard the appeal. It is not a single judge motion. Thus, when bringing such a motion, counsel are well-advised to make clear in their materials that the motion is to be placed before the panel that heard the appeal. One method for achieving this is to direct the materials to the attention of the office of the court's Executive Legal Officer.

[20] Second, in this court, a motion to re-open before an order has been taken out is generally heard in writing. Even if an oral hearing is requested, it is for the panel to determine whether that is necessary: *Antonyuk v. Antonyuk*, 2022 ONCA 145, at para. 3; *Midland Resources Holding Limited v. Shtaif*, 2018 ONCA 743, 81 B.L.R. (5th) 191, at para. 14, leave to appeal refused, [2018] S.C.C.A. No. 541.

DISPOSITION

[21] For these reasons, the Motion is dismissed with costs payable to Mr. McGrath by Mr. Ramsundarsingh fixed at $7,000, all inclusive. In accordance with standard practice at this court, the costs are payable within thirty days of the release date of these reasons: *Rules of Civil Procedure*, r. 57.03(1).

"E.E. Gillese J.A."
"Gary Trotter J.A."
"I.V.B. Nordheimer J.A."