COURT OF APPEAL FOR ONTARIO

CITATION: Bitaxis Estate v. Bitaxis, 2023 ONCA 66
DATE: 20230126
DOCKET: COA-22-CV-0009

MacPherson, Hoy and Coroza JJ.A.

BETWEEN

Steve Dimakarakos, in his capacity as named estate trustee of the estate of Theoni Bitaxis

Applicant (Respondent)

and

George Bitaxis, Christina Alimena, Bill Bitaxis, James Bitaxis, Bessy Bitaxis, Vassiliki Bitaxis, Liza Bitaxis, Angelos Bitaxis, Eva Starogenis, Kyriakos Cisco, Kyriaki Koula, Athanasios Dimakarakos, Peter Dimakarakos, Stella Economou, Sophia Kalogerakos, Peter Kapakos, Maria Kapakos, Dina Kapakos, Bessy Lassis, Stavroula Orphanakos, Danny Parigoris, Bessy Psihopedas, Louis Rigakos, Christina Stamatatos, Maria Stone, Peter Stone, Laura Stone, Paolo Chakiris, Thanasi Dimakarakos, Bessy Diamantakos, Christina Parigoris, Demosthenes Parigoris, Georgia Dimakarakos and The Office of the Children's Lawyer

Respondents (Appellant)

David Morgan Smith and Mark Donald Lahn, for the appellant

Benjamin D. Arkin, for the respondent

Heard and released orally: January 24, 2023

On appeal from the judgment of Justice Peter J. Cavanagh of the Superior Court of Justice, dated July 27, 2022, with reasons reported at 2022 ONSC 4386.

REASONS FOR DECISION

[1] The appellant appeals the judgment of the application judge, vacating his Notice of Objection, dated July 2, 2021, in response to the respondent's application for a Certificate of Appointment of Estate Trustee with a Will with respect to the Last Will and Testament of Theoni Bitaxis dated April 18, 2019 and Codicil dated July 2, 2019 (hereinafter the "2019 Will") and ordering that the respondent be appointed as the sole Estate Trustee.

[2] The appellant argues that the application judge erred in concluding that he failed to adduce, or point to, some evidence which, if accepted, would call into question the validity of the 2019 Will and, as a result, vacating his Notice of Objection. He argues that the application judge did not appreciate that his role was simply that of gatekeeper, tasked with deciding whether the appellant should be given tools, such as documentary discovery, to challenge the validity of the 2019 Will. The appellant says that the reasoning of the application judge in distinguishing *Stone v. Firestone*, an unreported endorsement of Dietrich J. dated June 14, 2022, shows that the application judge did not properly apply the minimum evidentiary threshold in this case. As he did before the application judge, the appellant argues that the evidence in this case is stronger than the evidence in *Stone*.

[3] We are not persuaded that there is any basis for this court to interfere with the judgment of the application judge.

[4] In *Neuberger v. York*, 2016 ONCA 191, 129 O.R. (3d) 721, at para. 88, leave to appeal to S.C.C. refused, [2016] S.C.C.A. No. 207, this court held that an interested person must meet some minimal evidentiary threshold before a court will accede to a request that a testamentary instrument be proved. To meet the evidentiary threshold, the person seeking to challenge a will must adduce, or point to, some evidence which, if accepted, would call into question the validity of the testamentary instrument that is being propounded: *Neuberger*, at para. 89.

[5] The application judge considered and applied *Neuberger*. He clearly appreciated that the purpose of the minimal evidentiary threshold was to determine whether the appellant was entitled to documentary discovery. His decision is entitled to deference: *Johnson v. Johnson*, 2022 ONCA 682, at paras. 15 and 20, leave to appeal to S.C.C. requested, 40477.

[6] The application judge considered all the evidence adduced by the appellant. He also considered *Stone*. He held that the evidence in that case, if accepted, would have called into question the validity of the will. In contrast, he held that the appellant's evidence "does not suggest that Theoni may have lacked testamentary capacity, or that she was potentially subject to undue influence, when the 2019 Will was executed."

[7] The appellant points to no palpable and overriding error or error in principle. Contrary to his submissions, he asks this court to reweigh the evidence before the application judge and come to a different conclusion.

[8] Accordingly, this appeal is dismissed. The respondent shall be entitled to his costs of the appeal from the appellant, fixed in the agreed upon amount of $12,500, inclusive of HST and disbursements.

"J.C. MacPherson J.A."
"Alexandra Hoy J.A."
"S. Coroza J.A."