COURT OF APPEAL FOR ONTARIO

CITATION: Devonport v. Devonport, 2025 ONCA 753
DATE: 20251105
DOCKET: COA-25-CV-0050

Copeland, Wilson and Pomerance JJ.A.

In the Estate of Eleanor Martha Devonport, deceased

BETWEEN

Catherine Devonport, in her personal capacity and in her capacity as the Estate Trustee for the Estate of Peter Devonport

Applicant (Respondent)

and

Nancy Devonport, in her personal capacity and in her capacity as the Estate Trustee of the Estate of Eleanor Martha Devonport

Respondent (Appellant)

Lionel J. Tupman, James Dilworth and Daniel Nassrallah, for the appellant

Leanne Catherine Storms and Eric Lay, for the respondent

Heard: November 3, 2025

On appeal from the judgment of Justice Owen Rees of the Superior Court of Justice, dated December 4, 2024, with reasons reported at 2024 ONSC 6764.

REASONS FOR DECISION

[1] The appellant appeals from the judgment of the application judge interpreting the will of Eleanor Martha Devonport (the "testator"). The will provided for a specific bequest to the testator's son of a property on Hopewell Avenue in the

City of Ottawa. The testator's son pre-deceased her. The application judge found that the Hopewell property did not lapse into the residue of the testator's estate, but rather, pursuant to s. 31 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "*SLRA*"), passed to the wife of the testator's son. On that basis, the application judge declared the son's wife the owner of the Hopewell property from the date of the testator's death.

[2] After hearing submissions from the appellant, we dismissed the appeal without calling on the respondent, with reasons to follow. These are our reasons.

[3] The appellant argues that the application judge erred in concluding that the anti-lapse provision of s. 31 of the *SLRA* applied. The appellant argues that the terms of the will show a contrary intention which renders s. 31 inapplicable. The appellant further argues that the application judge erred in excluding the evidence of the solicitor who assisted the testator in drafting the will.

[4] We are not persuaded that the application judge erred. The application judge's interpretation of s. 31 of the *SLRA* was correct and consistent with the jurisprudence. He also correctly set out the principles applicable to interpreting the terms of a will and determining the subjective intention of the testator. He made no palpable and overriding error in his interpretation of clause 3(e) of the will, which provided for the disposition of the Hopewell property, in the context of the will as a whole, and made no error in concluding that the will did not show a contrary

intention which would oust the application of the anti-lapse provision in s. 31 of the *SLRA*. Nor did the application judge err in his interpretation of clause 6, which he found would only become operative if one of the beneficiaries separated or divorced.

[5] We also see no error in the application judge's conclusion that the evidence of the solicitor who assisted the testator in drafting the will was not admissible. In any event, as the application judge noted, even if the solicitor's evidence were admissible, it did not support the conclusion that the will expressed a contrary intention which would render the anti-lapse provision of s. 31 of the *SLRA* inapplicable.

[6] The appellant also argues that the application judge erred in requiring her to pay occupation rent of $1,698 monthly from the date of the testator's death for her use of the main floor apartment in the Hopewell property. The appellant makes two arguments in relation to occupation rent.

[7] First, she argues that the respondent did not have the right to be heard on this issue because it was not raised below. The appellant is incorrect in this assertion. In her notice of application, the respondent specifically requested an order that the appellant pay occupation rent from the date of the testator's death.

[8] Second, the appellant argues that she maintained the Hopewell property and, on this basis, should have only been required to pay 50% rent, as was the case for rent paid by her brother before his death.

[9] The argument regarding reduced rent in exchange for maintenance of the property was not made before the application judge. Because the issue was not raised below, there is an insufficient evidentiary foundation to consider it. The application judge did not err in not considering this issue. Further, we see no error in the application judge setting the occupation rent for the appellant's use of the main floor apartment based on the occupation rent paid by the respondent for the upstairs apartment, given the similarity of the two apartments.

[10] In any event, without making any concession on the merits of the appellant's claim for reduced rent in exchange for maintenance, the respondent concedes that the appellant can advance that claim in the accounting ordered by the application judge of the appellant's dealings with the Hopewell property.

[11] The appeal is dismissed with costs to the respondent in the agreed amount of $30,000, inclusive of disbursements and applicable taxes.

"J. Copeland J.A."
"D.A. Wilson J.A."
"R. Pomerance J.A."