

Date: 20150915
Docket: 14/41
Citation: *Sinnott v. Sinnott Estate*, 2015 NLCA 41

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

JOSEPH SINNOTT JR., SANDRA SINNOTT
and DIANNE WALBOURNE

APPELLANTS

AND:

ROBERT R. REGULAR, as Executor of the
Last Will and Testament of the late
Joseph Patrick Sinnott, JUDITH DUPUIS
and DEBBIE MILLER

RESPONDENTS

Coram: Welsh, Rowe and White JJ.A.

Court appealed from: Supreme Court of Newfoundland and Labrador
Trial Division (General)
201201E10928, 2014 NLTD(G) 59

Appeal heard: March 19, 2015

Judgment rendered: September 15, 2015

Reasons for Judgment: White J.A.

Concurred in by: Welsh and Rowe JJ.A.

Counsel for the Appellants:

Paul M. McDonald

Counsel for the Respondents:

Robert R. Regular as Executor of the Last Will and Testament of Patrick Sinnott	Catherine Perry
Judith Dupuis	John Drover
Debbie Miller	Self-represented

White J.A.:

[1] This case considers how a will is to be interpreted.

BACKGROUND

[2] Joseph Patrick Sinnott made his will on March 20, 1998 and left portions of his St. John’s property, which was bordered by Bay Bulls Road on one side and South Brook River on the other, to each of his five children. A designated parcel was devised to each of his four daughters, Diane, Debbie, Judy, and Sandra, with Diane and Debbie receiving extensions to land Mr. Sinnott conveyed to them in 1977 and 1989, respectively. His son, Joseph Jr., was devised “my dwelling house and land” and the residue of the land.

[3] On December 26, 1999, Mr. Sinnott moved into a new house built on the parcel designated for Judy. He resided there until he passed away on February 22, 2012. At his death, the older residence was still standing and continued to have electricity services, notwithstanding that it was subject to a demolition order by the city of St. John’s as a condition of the building permit issued for Mr. Sinnott’s new house in 1999. The older dwelling house was still in existence on the date Mr. Sinnott’s will was probated and at the time the applications judge rendered his decision.

[4] What was left to Joseph Jr. and to Judy? Did clause 3(b), which gave Joseph Jr. “my dwelling house and land”, defeat the specific land devise to Judy at clause 3(h)? Did clause 3(h), which gave Judy a designated piece of land, include Mr. Sinnott’s new dwelling house? Probate was granted in

November of 2012 and, when the beneficiaries failed to agree on these issues, the named executor applied for the court's opinion, advice, and direction per section 25 of the *Trustee Act*, RSNL 1990, c. T-10.

Decision on the Application

[5] The applications judge resolved these questions by finding that the late Mr. Sinnott had two residences at the time of his death – one, which he had occupied until December 26, 1999, and the other, which he occupied from December 26, 1999 until his death (see paragraph 14 of the Reasons for Judgment). In considering clause 3(b) and determining which of the two dwelling houses Mr. Sinnott intended to give to Joseph Jr., the applications judge wrote:

[22] ... the devise in paragraph 3(b) to Joseph Jr., is of “my dwelling house and land”. [Mr. Sinnott] does not choose to identify it as that residence only which he occupied at the time of his death. He had occupied, as noted, two residences of relevance at the time of his death. To propose that his reference in clause 3(b) was to the newer one and not to the older:

1. is not available on the wording itself, as I have noted;
2. would result in Joseph Jr. having received both residences and;
3. would preclude the devise to Judy.

[23] ... the late Mr. Sinnott's intentions at the time of his death, on the construction of the whole of the Will was to include his daughter, Judy, and there is no basis upon which to conclude otherwise, especially where the separate devise to Joseph Jr. continues to operate without having to overtake that devise to Judy.

[6] The applications judge concluded there was no ambiguity in the will: Mr. Sinnott intended to give property to each of his children including Judy, the property meant for Judy was clearly defined in clause 3(h) and, finding that the general devise to Joseph Jr. in clause 3(b) referred to the older dwelling house was harmonious with the rest of the will. Both devises could operate without conflict.

[7] The applications judge supported his conclusion by noting in passing that even at the time the will was made, the late Mr. Sinnott gave portions of his land to each of his children, showing an intention to benefit each child. He also specified that the property for Joseph Jr. required a right-of-way,

which was referenced in clause 3(k) in the residue bequest to Joseph Jr. The older dwelling house requires such access but the new residence, which fronts Bay Bulls Road, does not. This confirmed the late Mr. Sinnott's intention to devise the old dwelling house to Joseph Jr. both at the time of his death and when he executed his will.

ISSUES

[8] There are two issues:

1. What is the appropriate standard of review?
2. Did the applications judge err in finding that Mr. Sinnott's estate included two dwelling houses and that Joseph Jr. was to receive the older dwelling house?

APPELLANT'S CASE ON APPEAL

[9] Joseph Jr., the Appellant, argues that the applications judge described a state of affairs that never existed when he found that Mr. Sinnott had two dwelling houses at the time of his death. When Mr. Sinnott made his will, there was a single dwelling house, namely the 'older dwelling house'. At the time of his death, in light of the demolition order by the city of St. John's and by virtue of where Mr. Sinnott was living, there was again but a single dwelling house. Joseph Jr. alleges that the bequests of "my dwelling house" and, in a separate clause, its contents clearly show Mr. Sinnott's intention to give Joseph Jr. the dwelling house where Mr. Sinnott was residing at his death.

[10] As such, Joseph Jr. says that clauses 3(b) and 3(h) are two absolute gifts of the same property and are in clear conflict with each other. He contends that the first provision, clause 3(b), should prevail.

RESPONDENT'S RESPONSE ON APPEAL

[11] Judith Dupuis ("Judy" in the will), one of the Respondents, suggests that Joseph Jr. is asking the court to apply a technical meaning of the word "dwelling house" without referring to Mr. Sinnott's will as a whole. Instead, she says the applications judge properly considered the language of the will and the circumstances at Mr. Sinnott's death to find that he intended to give a parcel of his land to each of his children, including the specific parcel described in clause 3(h) devised to her.

[12] Judy states that there was sufficient evidence to support the applications judge's conclusion that Mr. Sinnott had two dwelling houses when he died, including Mr. Sinnott's intentions and the words in the will. She notes that the wording of the will and Mr. Sinnott's intentions cannot allow Joseph Jr. to receive both houses and land with no devise to her. She asks this Court to uphold the applications judge's decision and seeks costs. In the event that clauses 3(b) and 3(h) are found to be conflicting, she contends that the case law indicates the latter provision ought to prevail.

STANDARD OF REVIEW

[13] The interpretation of a will is a question of law and, as such, is reviewable on a correctness standard (see *Elton Estate v. Elton*, 2010 NLCA 2, 292 Nfld. & P.E.I.R. 237, and *Bussey et al. v. Maher et al.*, 2006 NLCA 28, 256 Nfld. & P.E.I.R. 308). That said, where there are findings of fact underpinning the application of the law (mixed fact and law), those findings are reviewable on the standard of palpable and overriding error (see *Ring v. Canada (Attorney General) et al.*, 2010 NLCA 20, 297 Nfld. & P.E.I.R. 86).

[14] In this case, the general principles of will interpretation must be reviewed on a correctness standard, and the applications judge's application of them on a standard of palpable and overriding error.

DISCUSSION OF THE ISSUES AND THE LAW

[15] In *National Trust Co. Ltd. v. Fleury et al.*, [1965] S.C.R. 817, Ritchie J. wrote at page 829 that courts should look to the words of the will to determine a testator's intentions before considering the rules of construction:

In the construction of wills, the primary purpose is to determine the intention of the testator and it is only when such intention cannot be arrived at with reasonable certainty by giving the natural and ordinary meaning to the words which he has used that resort is to be had to the rules of construction which have been developed by the Courts in the interpretation of other wills. ...

[16] James MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed., loose-leaf (Markham: LexisNexis Canada Inc., 2000) adds that the testator's intention is to be determined based on the will as a whole:

10.60 The testator's intention is to be gathered from a consideration of the will as a whole and not solely from the words used, say, in an unclear portion of the will. The ordinary meaning rule and other rules of construction are entirely subservient to the context of the will. This idea is often expressed by saying that

the testator's intention is to be ascertained, first of all, from the four corners of the will.

[17] The general rule that a court must rely exclusively on the four corners of a will to determine a testator's intention is the law in Newfoundland and Labrador:

[20] This Court decided recently in *Maher v. Bussey et al.*, 2006 NLCA 28, 256 Nfld. & P.E.I.R. 308, that where there is an ambiguity as to whether a testator has disposed of assets, it is an error in law to engage the armchair rule without first considering whether the language of the will can be construed so as to result in a complete disposition of all of the property. . . . The armchair rule will be engaged only if the testator's intention cannot be discerned from the language of the will: see *Bussey* at paras. 17-18.

(*Jayaraman v. DeHart et al.*, 2007 NLCA 32, 266 Nfld. & P.E.I.R. 195; emphasis added.)

[18] Where there are conflicting provisions in a will, Feeney states that:

10.98 A court will make every effort to reconcile the two apparently conflicting provisions of a will, rather than absolutely ignore one or the other of them, or call either of them void for uncertainty.

[19] Feeney also notes that there is a presumption against disinheritance and while it "is now not nearly as strong as the presumption against intestacy", it nevertheless persists (at paragraph 10.81).

ANALYSIS

Did the applications judge err in finding that Mr. Sinnott's estate included two dwelling houses and that Joseph Jr. was to receive the older dwelling house?

Did the applications judge apply the correct law?

[20] The applications judge canvassed various authorities before turning to analyze the will. He considered the words of the will and determined Mr. Sinnott's intentions at the time of this death based on the words of the will. Only in passing did the applications judge consider the circumstances surrounding Mr. Sinnott when he made his will.

[21] The applications judge referenced section 15 of the *Wills Act*, RSNL 1990, c. W-10, which says that:

15. A will shall be construed with reference to the property comprised in it, to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

[22] No such contrary intention was found.

[23] The applications judge also referenced *Bussey* at para. 17 citing *Dunn Estate, Re* (1990), 81 Nfld. & P.E.I. R. 170, 255 A.P.R. 170 (NFCA) at para. 12 which states that “[t]he meaning [of a will] must firstly be sought in the language of the will itself. If such is not possible, then the surrounding circumstances may be considered”. He similarly referenced *Elton* at para. 24 for the proposition that “[w]here there is ambiguity it is established in this jurisdiction that evidence is admissible respecting the surrounding circumstances known to the testator when the will was made”. Not finding an ambiguity, the applications judge did not consider the circumstances surrounding the making of Mr. Sinnott’s will.

[24] The applications judge correctly determined the testator’s intentions and considered the words in the will as a whole. Under the law as it exists in Newfoundland and Labrador, the applications judge was correct not to consider the factual matrix surrounding the creation of Mr. Sinnott’s will.

Did the applications judge make a palpable and overriding error in applying the law to the facts?

[25] The applications judge considered the correct principles and correctly refrained from applying the rules of construction where he found they were not necessary.

[26] Based on the facts, it was open to the applications judge to find that Mr. Sinnott had two dwelling houses when he died: he continued to own both houses, he had resided in each home, both residences were standing, and the demolition order by the city of St. John’s against the older dwelling house was more than ten years old. (Evidence was presented to show that Mr. Sinnott was in an ongoing dispute with the city regarding the older dwelling house.)

[27] It was similarly open to the applications judge to find that the devise to Joseph Jr. in clause 3(b) of the will referred to the older dwelling house. This was consistent with Mr. Sinnott’s intention to devise pieces of his property to each of his children and gave effect to the devise to Joseph Jr. and the devise to Judy. This harmonious reading was available to the

applications judge and was supported by the presumption against disinheritance. It was also bolstered by the reference in clause 3(k) of the will, the right-of-way “leading from Bay Bulls Road to the land of my homestead to be used as a right-of-way for the homestead”.

CONCLUSION

[28] In this case, the applications judge properly determined the meaning of the will and I would uphold his decision in full. Accordingly, I would dismiss the appeal. The applications judge exercised his discretion to order that the solicitor-client costs of all parties be taxed and paid out of the estate. In the circumstances, I would allow costs on the appeal on the same basis for all parties to be taxed and paid by the estate.

C. W. White J.A.

In concur: _____

B. G. Welsh J.A.

In concur: _____

M. H. Rowe J.A.