2018 ONSC 1840
Ontario Superior Court of Justice [Estates List]

Martin v. Martin

2018 CarswellOnt 4959, 2018 ONSC 1840, 290 A.C.W.S. (3d) 449, 38 E.T.R. (4th) 161

IN THE MATTER OF THE ESTATE OF MARIAN MARTIN, deceased

Robert Martin (also known as Robert C. Martin Sr.), in his capacity as Estate Trustee of the estate of Marian Martin (Moving Party) and Marian Martin (also known as Marian Martin Jr.), in her personal capacity (Responding Party)

L.A. Pattillo J.

Heard: March 13, 2018
Judgment: March 28, 2018
Docket: 2017-010421

Counsel: Jordan D. Oelbaum, Lisa M. Fenech, for Moving Party
Richard Worsfold, for Responding Party

***L.A. Pattillo J.*:**

1 This is a motion by Robert Martin ("Robert") for an order pursuant to rule 75.03(2) of the *Rules of Civil Procedure* removing the Notice of Objection of the Respondent, Marian Martin ("Marian"), his sister, and issuing a Certificate of Appointment of Estate Trustee with a Will to him. In the alternative, Robert seeks an order for directions prior to mediation pursuant to rule 75.06.

Background

2 Marian Martin (the "Deceased") died on November 17, 2016 at the age of 81. She was predeceased by her husband. Together they had four children, Marian, Robert, Elizabeth Martin ("Elizabeth") and Thomas Martin ("Thomas"). She has seven grandchildren, three by Robert and four by Thomas. Neither Marian nor Elizabeth is married.

3 The Deceased had significant assets. In addition to her house in Toronto, she owned a farm property in Port Perry and was the primary shareholder of two companies, one of which owns substantial commercial real estate and the other of which owns a property in Florida.

4 The Deceased executed Primary and Secondary Wills on January 13, 2012 (together the "January 2012 Wills"). Robert is named as Estate Trustee in both wills.

5 The Primary Will governs the Deceased's real estate and provides, among other things, that Elizabeth is to have exclusive use of the farm property and the Estate Trustee is to set aside sufficient funds to pay for certain of the expenses. The residue of the Primary Estate is to be divided equally among Marian, Robert, Elizabeth and Thomas.

6 The Secondary Will directs that the Secondary Estate is to be held in trust for her children for the latest of either 21 years and 11 months or the death of all her children. The Trustee (Robert) has the sole and absolute discretion to distribute income and encroach on capital. If the Trustee exercises that discretion, he must distribute the income and capital to her children and grandchildren, as follows: 25 shares to Robert; 25 shares to Thomas; 19 shares to Marian; 26 shares to Elizabeth; and 5 shares to be divided among the grandchildren. On the distribution date, the residue of the

Secondary Estate is to be divided between Robert and Thomas' children, conditional on the execution of a Shareholders Agreement by each issue.

7 Pursuant to the January 2012 Wills, any gift, devise or bequest as specified therein is conditional on each of the children delivering a written acknowledgement that the January 2012 Wills are valid, within three months of the death of the deceased, failing which such beneficiary will be determined to have predeceased the Deceased for the purpose of the interpretation of the Wills.

8 Each of Robert, Elizabeth and Thomas have all signed and delivered the required written acknowledgement within the time required. Marian has not.

9 On February 16, 2017, Marian filed a Notice of Objection to the issuing of a Certificate of Appointment of Robert as Estate Trustee. The grounds specified were undue influence, lack of testamentary capacity and suspicious circumstances.

10 On August 15, 2017, Robert provided notice to Marian of his application for a Certificate of Appointment of Estate Trustee of the Deceased's Estate in respect of the Primary Will of the January 2012 Wills. Marian subsequently filed a Notice of Appearance on her own behalf. This motion was commenced by Robert by Notice of Motion dated October 20, 2017.

11 Pursuant to a direction from the court on December 13, 2017, Marian sent a letter to Robert's counsel setting out "some of the evidence" she relied on to support her objection. That evidence included her statements that the Deceased prepared multiple wills in a short time period, some signed, some not, including in 2005, 2006, 2012 (2 sets of wills), 2013 and 2015; the Deceased signed secondary and tertiary wills in October 2012 which were witnessed by her secretary; a January 24, 2010 fax from Robert to a lawyer who the Deceased had consulted about a will setting out her wishes; a page from the Deceased's diary dated January 13, 2012 indicating her intent to sign a "temporary will"; the front page of a reporting letter from the solicitor who drew up the January 2012 Wills; the major changes from the 2005 will; the fact that the January 2012 Wills gave absolute and uncontrolled discretion to Robert as Trustee of the Trust. The letter also referred to a health record from the Scarborough Hospital noting that the Deceased's past psychiatric history was "remarkably unremarkable". Noted as being attached to the letter was an affidavit from Elizabeth, described as the primary caregiver.

12 Robert responded to Marian's material, including Elizabeth's affidavit, by filing a Reply affidavit noting that the material differences between the January 2012 Wills and the October 2012 Wills was a change in the distribution of the residue of the Primary Estate from the children equally to a similar distribution as the income and capital from the Secondary Trust and with respect to the Secondary Estate, the removal of the Trustee's absolute discretion to distribute income or capital from the Secondary Estate Trust and the removal of the requirement for a Shareholders' Agreement upon the distribution of the residue of the Secondary Estate to the grandchildren.

13 Marian subsequently retained counsel less than a week before the motion's return date who filed a Responding Record on March 8, 2018, containing the affidavit from Elizabeth referred to by Marian in her December 13, 2017 letter and the affidavit of Ms. Gale Cain, the Deceased's housekeeper for seven years prior to her stroke in October 2015.

14 Both Elizabeth's and Ms. Cain's affidavits speak to Robert's dealings with the Deceased concerning her wills, in the case of Elizabeth, after the Deceased's husband died in August 2005 and in the case of Ms. Cain, during the time she worked for the Deceased. Elizabeth, who was the Deceased's primary and only caregiver, states that she believes her mother was unduly influenced by Robert with limited testamentary capacity when she signed the January 2012 Wills. Ms. Cain spoke to various conversations she had with the Deceased where the Deceased told her of Robert's attempts to have her change her will.

Position of the Parties

15 Relying on the Court of Appeal decision in *Neuberger Estate v. York*, 2016 ONCA 191, 129 O.R. (3d) 721 (Ont. C.A.), Robert submits that Marian has not provided any evidence to support the validity of her objection to Robert's application for a Certificate of Appointment and therefore her objection should be vacated and the Certificate of Appointment issued.

16 Marian submits that she has provided sufficient evidence to demonstrate that her objection to Robert's application has some validity and the court should issue an order for directions providing for production of both medical and testamentary documents followed by mediation.

Discussion

17 The person propounding the will has the legal burden of proof with respect to due execution, knowledge and approval: *Vout v. Hay*, [1995] 2 S.C.R. 876 (S.C.C.). Once that burden is met, the burden shifts to those challenging the will to establish "suspicious circumstances" - evidence which, if accepted, would tend to negate knowledge and approval or testamentary capacity. If such evidence is adduced, the burden switches back to the propounder. If undue influence is alleged, the burden is on those attacking the will: *Neuberger Estate* at paras 77-78.

18 Estate proceedings are governed by Rule 75 of the *Rules of Civil Procedure.*

19 Rule 75.01 provides that an estate trustee or any person appearing to have a financial interest in an estate (an "Interested Person") may make an application to have a testamentary instrument that is put forward as the last will of the deceased proved in such manner as the court directs.

20 Rule 75.03(1) provides that an Interested Person may file a notice of objection any time before a certificate of appointment is issued. A notice of objection expires three years after it is filed and may be withdrawn by the person who filed it at any time before a hearing for directions under rule 75.06 in an application for the certificate or may be removed by order of the court (rule 75.03(2)).

21 If an application is made to issue a certificate of appointment, it must be served on the objector who then has 20 days to file a notice of appearance failing which, the application shall proceed as if the objection had not been filed (rule 75.03(3) - (5)).

22 Rule 75.03(6) provides that if the applicant does not move for directions under rule 75.06 within 30 days following service of the notice of appearance, the objector may do so.

23 Rule 75.06 sets out the procedure for a motion for directions. Rule 75.06(1) provides that an Interested Person may apply for directions as to the procedure for bringing the proceeding before the court.

24 Rule 75.06(3) sets out the various steps that the court may direct to facilitate a resolution of the proceeding.

25 In *Neuberger Estate*, the court considered the question of whether an Interested Person has an automatic right to proof of the will in solemn form and concluded, based on a plain reading of rules 75.01 and 75.06 that while an Interested Person has the right to request formal proof of a will, they are not entitled, as of right, to require the will be proved in solemn form.

26 After setting out her reasons for reaching the above decision, Gillese J.A., who wrote the decision for the court in *Neuberger Estate*, stated at para. 89 of the decision:

> 89 Based on the above analysis, in my view, an applicant or moving party under rule 75.06 must adduce, or point to, some evidence which, if accepted, would call into question the validity of the testamentary instrument that is being propounded. If the applicant or moving party fails in that regard or if the propounder of the testamentary instrument successfully answers the challenge, then the application or motion should be dismissed. If, on the other

hand, the applicant or moving party adduces or points to evidence that calls into question the validity of the testamentary instrument which the propounder does not successfully answer, the court would generally order that the testamentary instrument be proved. In determining the manner in which the instrument be proved, the court would have recourse to the powers under rule 75.06(3).

27 In *Neuberger Estate*, two Interested Persons (a co-estate trustee, the daughter of the testator, and her son) each started legal proceedings challenging the validity of the testator's wills alleging lack of capacity. In this case, however, Marian has not commenced a legal proceeding challenging the validity of the January 2012 Wills. Rather, she has objected to Robert's application for a Certificate of Appointment on the grounds the January 2012 Wills are not valid due to lack of capacity, undue influence and suspicious circumstances.

28 Notwithstanding that Marian has proceeded by way of objection as opposed to commencing a legal proceeding to declare the January 2012 Wills invalid, in my view the holding in *Neuberger Estate* applies equally to require her to adduce or point to some evidence which, if accepted, would give some basis for the validity of her objection to the January 2012 Wills.

29 Marian's objection to the issuance of a certificate of appointment to Robert is effectively a will challenge. It is based on allegations of lack of testamentary capacity and undue influence.

30 Further, once the objector has filed an appearance to an application for a certificate of appointment, rule 75.03(6) engages rule 75.06 and the objection must be dealt with pursuant to rule 75.06. As *Neuberger Estate* points out at para. 86, rule 76.06 (3), which sets outs the various steps the court may direct, is permissive. It gives to the court a wide discretion to deal with the way in which the objection should be resolved.

31 The above approach is consistent with prior jurisprudence under rule 75.03. In *Smith v. Vance*, [1997] O.J. No. 6534 (Ont. Div. Ct.), the court held that, in order to be added as a party to the proceeding, an objector must do more than simply assert an interest in the estate. Rather they must present sufficient evidence of a genuine interest and meet a threshold test. The court stated that the evidence need not be conclusive but must be capable of supporting an inference that the claim is one that should be heard.

32 Finally, the above approach ensures that objections which have no validity are dealt with on a summary basis and at minimal cost to the Estate and the parties.

33 In *Neuberger Estate*, the Court did not elaborate on the strength of the minimal evidentiary threshold that must be met beyond stating that, in the case of a will challenge, the evidence adduced should, if accepted, call the validity of the will into question. At the same time, the Court noted that it is open to the propounder to answer the evidence.

34 In the recent decision of *Seepa v. Seepa*, [2017] O.J. No. 4649 (Ont. S.C.J.), Myers, J. discussed the application of the *Neuberger Estate* test at para. 35:

> 35 While the tests are clearly and succinctly set out by the Court of Appeal, there remains much room for uncertainty in their application. What is the standard of proof at play? What does the applicant have to do to answer the minimal evidentiary threshold? Is it enough that the proponent denies the applicant's evidence? In my view, it cannot be enough to just join issue. Issues beg for resolution. Need there be a "genuine issue requiring a trial?" That phrase, of course, is drawn from Rule 20.04 (2)(a) that governs summary judgment. Need a proponent show that he or she would be entitled to summary judgment in order to avoid proof in solemn form? That too cannot be right. At this preliminary stage, the issue is not whether the applicant has proven his or her case but whether he or she ought to be given the tools, such as documentary discovery, that are ordinarily available to a litigant before he or she is subjected to a requirement to put a best foot forward on the merits. Normally, a litigant must just plead facts that support a cause of action to become entitled to use the full panoply of fact-finding tools provided by the Rules. In estates cases, more is required. Some evidentiary basis to proceed is required in order to address the specific policy concerns that are discussed above.

35 Given that, at this preliminary stage, the next step is documentary discovery concerning the Deceased's medical information and her dealings with her lawyers concerning her wills, the threshold required for Marian to maintain her objection is low. The evidence supporting the validity of the objection must be more than the suspicion of the objector. In my view, considering the evidence as a whole, Marian has met that threshold.

36 The evidence of both Elizabeth and Ms. Cain raises the specter of Robert's potential undue influence over his mother concerning the January 2012 Wills. There is also evidence that Robert was involved in drafting instructions for his mother's will in 2011. Although Robert says that he was only acting on his mother's instructions, he does not address the evidence of Elizabeth and Ms. Cain about his dominating role with his mother concerning her testamentary decisions both before and after the January 2012 Wills. As the person running the two family companies, he certainly had the most to gain from retaining control. In fairness, however, Ms. Cain's affidavit was produced only a few days before the motion.

37 I make no findings concerning the evidence at this stage except to say that, in my view, Marian has met the low threshold required at this stage to obtain documentary discovery.

38 Notwithstanding that there is no evidence which suggests a lack of testamentary capacity prior to or at the time of the January 2102 Wills, I consider that in addition to the solicitors' records, production of the medical records should also be required as they may shed light on the issue of undue influence.

Conclusion

39 Robert's motion is therefore dismissed. His alternative request for an order for directions is allowed. In that regard, an order shall issue providing for the following:

1. Each party shall produce to the opposing party all documents in his/her power, possession, or control which are or appear to be testamentary documents, including all wills, codicils, and powers of attorney, within 15 days hereof;

2. The parties are entitled to release of and to compel production of any and all:

i. medical notes, records and files relating to the deceased from any person or physician, institution, healthcare facility or healthcare provider in possession, power or control of such documents for the period commencing January 13, 2010 to January 13, 2013;

ii. solicitor's records, notes and files relating to the deceased's Wills and estate planning, including but not limited to records, notes and files from Jordin Atin, Minden Gross LLP and Allan Keith of Robertson & Keith, and that all records, notes and files received by one party shall be produced to the other parties herein on receipt; and

iii. any testamentary documents or copies thereof, from any person having possession of such documents, including testamentary documents or copies thereof held by the Responding Party, Thomas Martin and/or Elizabeth Martin.

3. Any claim of solicitor-and-client privilege and/or the duty of confidentiality in relation to estate planning and preparation of wills above shall be waived and dispensed with.

4. Within 30 days of receipt of the production referred to above, or on such earlier date as the parties may agree, the parties shall return to court for further directions regarding the issues in the application.

40 Robert was not successful on his primary motion and should therefore pay costs. While Robert was successful on his alternative motion, similar relief, albeit with mediation, was requested by Marian. Further, while Marian's evidence was sufficient to meet the threshold at this stage, it is a low bar.

41 Costs of the motion to Marian, in the cause, payable by Robert personally, fixed at $1,500.

Motion dismissed; alternative relief granted.