

IN THE COURT OF PROBATE FOR NOVA SCOTIA

Citation: *Baker v. Baker Estate*, 2018 NSSC 83

Date: 20180405

Docket: Probate Court, No. 15698

Bwt. No. 468337

Registry: Bridgewater

IN THE ESTATE OF REBECCA J. BAKER, Deceased

JENNIFER HELENE BAKER and JACQUES DAVID ALEXANDRE BAKER

Applicants

v.

KERRY HALEY, LILA HALEY, and ANNETTE COLLICUTT, Executors and
Trustees of the Last Will and Testament of the late REBECCA J. BAKER

Respondents

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Judge: The Honourable Justice Mona Lynch

Heard: March 9, 2018 in Bridgewater, Nova Scotia

**Final Written
Submissions:** March 15, 21 and 22, 2018

Written Decision: April 5, 2018

Subject: Estates and Trusts, disclosure of file material in relation to prior will.

Summary: The respondents are the named executors and trustees in the testator's 2016 will. The beneficiaries applied for proof in solemn form and to have the executors removed. The executors were removed on an interim basis pending hearing and determination of the application for their permanent removal. An interim administrator was appointed. The executors sought the legal file in relation to a will prepared in 1996 and a codicil prepared in 2001.

Issues:

- (1) Was solicitor/client privilege waived?
- (2) Is the legal file relevant to the applications for proof in solemn form and to have the executors removed?

Result: The interim administrator stands in the place of the testator, has waived solicitor/client privilege and is requesting the file. The will, codicil and file material are relevant to the testator's capacity and intentions and are to be disclosed to the interim administrator and the respondents.

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Counsel: William L. Ryan, Q.C. and Timothy C. Matthews, Q.C., for
the Applicants
John A. Keith, Q.C. and Tanya L. Butler, for the Respondents

By the Court:

Background:

[1] The main proceeding deals with two applications by two of the beneficiaries of the estate of the late Rebecca Jean Baker. The first application is for proof in solemn form of the Last Will and Testament executed on November 17, 2016. The second application is for an order to remove the respondents as the named executors and trustees.

[2] This is a motion by the respondents in the proceeding for an order that William R. Ryan, Q.C. disclose all files, documents and electronic information in his possession, custody and control relating to: (a) the preparation of any wills by him for Rebecca Jean Baker, whether executed or not; and (b) communications with Rebecca Baker.

[3] It is agreed that Mr. Ryan, Q.C. prepared a will for Rebecca Baker in about 1996 and a codicil in about 2001. Contrary to suggestions, Mr. Ryan, Q.C. did not have communications with Rebecca Baker in 2016 about the preparation of a new will.

[4] The named executors and trustees were removed on an interim basis pending the final determination of the application to remove them permanently. Royal Trust was appointed the interim administrator of the estate.

[5] The legal file of Mr. Ryan, Q.C. in relation to the preparation of any wills for Rebecca Baker, whether executed or not, was requested by counsel for the respondents in January 2018. Mr. Ryan, Q.C. responded that disclosure of files would not be provided. On January 23, 2018, a letter was sent from the proctor of the estate indicating that Royal Trust was waiving solicitor/client privilege in relation to Mr. Ryan's legal file relating to the preparation of any wills for Rebecca Baker, whether executed or not.

[6] The matter was heard on March 9, 2018, and counsel for the respondents raised the issue of who the file belonged to and whether the person who owns the file was requesting the file from Mr. Ryan, Q.C. Further briefs were filed on March 15, 21, and 22, 2018. The proctor for the estate confirmed that the Administrator, Royal Trust, is requesting the legal file of Mr. Ryan, Q.C.

Issue:

[7] Should the legal file of William R. Ryan, Q.C. in relation to the preparation of any wills for Rebecca Baker be disclosed?

Analysis:

[8] The request for disclosure of the legal files was broad and included any file materials relating to instructions for a new will in the fall of 2016. Mr. Ryan, Q.C. has said that there were no communications between himself and Rebecca Baker in relation to the preparation of a new will in the fall of 2016. Therefore, there is nothing to disclose in relation to a 2016 will. Also, Mr. Ryan, Q.C. represented Rebecca Baker in another matter and nothing in relation to that file need be disclosed as no relevancy has been established to any matter that is being decided in this proceeding.

[9] There are two questions in relation to disclosure of the file in relation to the preparation of the earlier will and codicil. The first is whether solicitor/client privilege is waived. The second is whether the disclosure is relevant to an issue being decided.

[10] In relation to solicitor/client privilege, it is clear that the privilege is the client's, not the solicitor's. Upon the client's death, the privilege rests in the personal representative (**Hicks Estate v. Hicks**, [1987] O.J. No. 1426 (Ont. Dist. Ct.)). In this case, the personal representative has waived the solicitor/client privilege.

[11] The question of the personal representative goes a little further in this case as the personal representative is requesting disclosure of the file. The personal representative stands in the place of the testator (**Wayne v. Wayne**, 2012 ABQB 763 at para. 43). The Nova Scotia Barristers' Society **Code of Professional Conduct**, September 23, 2011, s. 3.5-1 includes wills, client's correspondence and such other documents in the definition of "Client's Property". Section 3.5 deals with the care a lawyer must take of client's property. Both the commentary in section 3.5 and section 3.5-6 requires a lawyer to deliver the property to the client on request. Therefore, the file in relation to the preparation of the will in 1996 and the codicil in 2001 must be provided to Royal Trust, the administrator of the estate of Rebecca Baker, upon their request.

[12] However, the respondents are the named executors and they have been removed and replaced until the matter of the application to have them permanently

removed can be heard and determined. They are not, at the present time, the personal representatives of Rebecca Baker. The respondents motion for disclosure of the legal file is based on relevance and the waiver of solicitor/client privilege.

[13] Relevance has been defined many ways. In **R. v. McDonald**, 2017 ONCA 568 at paras. 67 and 68, the following is said regarding relevance:

[67] It follows that, to be relevant, an item of evidence need not conclusively establish the proposition of fact for which it is offered, or even make that proposition of fact more probable than not. All that is required is that the item of evidence reasonably show, by the application of everyday experience and common sense, that the fact is slightly more probable with the evidence than it would be without it: Luciano, at para. 206; *R. v. Arp*, [1998] 3 S.C.R. 339 (S.C.C.), at para. 38.

[68] A final point about relevance. We assess relevance in the context of the entire case and the positions of counsel. Relevance does not exist in the abstract or in the air: *R. v. Cloutier*, [1979] 2 S.C.R. 709, at pp. 730-33; *Arp*, at para. 38. Hence the importance that the proponent identify the issue(s) to which the evidence is relevant: *R. v. Handy*, at paras. 73-75.

[14] Relevance is something that is difficult to determine when all the evidence has not been considered.

[15] In the present case, the respondents submit that the file is relevant to Rebecca Baker's testamentary capacity and intentions. If the 2016 will fails, the 1996 will is the most recent executed will that the parties are aware of. The respondents are seeking to uphold the testamentary capacity and intentions of Rebecca Baker. They were the executors named by Rebecca Baker in her 2016 will. More specifically, the respondents submit that the file is relevant to Rebecca Baker's previous estate plan, the challenge to her testamentary capacity, her freedom from undue influence in making her will, her choice of executors and the decision to place funds in trust for her children.

[16] The applicants' position is that the requested disclosure is too broad and is a fishing expedition. They point to the fact that the 1996 will was made 20 years

before the will in question and the codicil was 15 years before. Rebecca Baker's situation was much different at that time, and her thoughts and intentions at that time are not relevant to the validity of the 2016 will or her choice of executors. They assert that the state of mind of Rebecca Baker at the time of the 2016 will is important and the instructions for, and content of, the 1996 will are not relevant.

[17] I do find that Rebecca Baker's previous will and codicil can be relevant to her testamentary capacity. While all the medical information is not before me, the facts asserted are that Rebecca Baker suffered a brain injury and was taking medications prior to the 1996 will. If these are factors in the challenge to the 2016 will, then the 1996 will is relevant as they existed at that time. As a matter of common sense, if she had capacity in 1996 despite the brain injury and medications, they are less of a factor in the challenge to the 2016 will.

[18] There is also an assertion that Rebecca Baker had always wanted a lawyer or trust company to act as her personal representative and would not have, without undue influence, named the respondents as executors. The provisions of the 1996 will and 2001 codicil, and the personal representative chosen at that time, can be relevant to the question of undue influence.

[19] I do find that the prior will, codicil and the file material in relation to the preparation of those two documents are relevant to questions being decided in the applications for proof in solemn form and the removal of the executors.

[20] The information that is relevant are the will and codicil themselves and the file material in relation to the preparation of the will and codicil.

[21] The applicants have raised the issue of their counsel, William R. Ryan, Q.C. becoming a witness in the proceeding and therefore being unable to continue to represent them. I am fully aware that the applicants are vulnerable for a number of reasons, they have a relationship with their counsel, and they want their counsel to continue to represent them. However, my findings that the evidence is relevant and that solicitor/client privilege has been waived require the material to be disclosed.

Conclusion:

[22] The 1996 will, the 2001 codicil and the file material in relation to the preparation of those documents shall be disclosed to the administrator and the respondents. The disclosure shall include all documents and electronic information in relation to the preparation of the 1996 will and 2001 codicil.

Lynch, J.