Don't dispense with formalities: Execution matters

Will-drafting is an area of legal practice that demands extremely careful attention to detail. Decisions in this area make it clear that even where a will is well-drafted and is consistent with the testator's known intentions, failure to have the will executed in accordance with the applicable legal formalities will render it invalid.

When that happens, the lawyer responsible for arranging and supervising the execution of the will may be liable in negligence to disappointed beneficiaries.

This consequence was recently confirmed by the Supreme Court of Newfoundland and Labrador in *Rowsell v. MacKinnon*[1], wherein Rowsell, a disappointed would-be beneficiary, was awarded damages against an accountant and his employer firm.

The testator in the case had made a series of wills, including in 1998, 2004 and 2005. In the 1998 will, he left his entire estate to his wife, with a gift over to his children. His wife passed away in 2003, and around the same time, the testator, who was in his eighties, became seriously ill. During his illness, he was cared for by a Mrs. Rowsell and her husband. The testator and Mrs. Rowsell had meet fifty years previously when she, then three years old, fell off a dock into the sea and he rescued and revived her.

In 2004, in recognition of the care provided to him when he was sick, the testator requested that his accountant change his will to include a bequest of $100,000 to Mrs. Rowsell. The accountant made the change, and the same bequest was included in a third will made in 2005.

Unfortunately, when supervising the execution of both the 2004 and 2005 wills, the accountant arranged for the attendance of only one witness (a clerk from the accounting firm). Because the *Wills Act* of Newfoundland and Labrador in effect at the time required that two witnesses witness and sign the will at the time of execution, both the 2004 and the 2005 wills were invalid and could not be admitted for probate, making the 1998 will – with no bequest to Mrs. Rowsell − operative.

Mrs. Rowsell sued the accountant and his firm in negligence.

The defendants argued that the testator should never have relied on them to prepare the will nor to arrange or supervise its execution because the accountant defendant was not a lawyer and did not hold himself out to be an expert in legal matters.

In coming to his decision that the accountant and the firm were, in fact, liable in negligence, Handrigan J. applied the *Anns* test[2], taking into consideration Canadian application of that test in cases such as *Kamloops (City of) v. Nielsen*[3], *Hill v. Hamilton-*

[1] 2011 NLTD 36 (CanLII)
[2] [1978] A.C. 728, [1977] 2 W.L.R. 1024, [1977] 2 All E.R. 492 (H.L.)
[3] 1984 CanLII 21 (S.C.C.)

Wentworth (Regional Municipality) Police Services Board[4] , and *Odhavji Estate v. Woodhouse*.[5] In deciding that the plaintiff was both foreseeable and proximate to the defendants, Handrigan J. cited two other wills cases: *Wilhelm v. Hickson*[6] and *White v. Jones*[7] for the general principle that disappointed beneficiaries, even if unknown personally to a party who drafts a will, are sufficiently proximate to the will drafter to be able to succeed in negligence against the will drafter in certain circumstances (*Wilhelm* was a case about misidentification of the owner of property; *White* was about undue delay in execution).

While the defendant in *Rowsell* was an accountant, not a lawyer, the court found that he had the trust of his client, and had held himself out as competent to do the work of a lawyer with respect to the testator's will. As a result, Handrigan J. held that the accountant "…owed the same duty of care to Ms. Rowsell, as a lawyer might have owed to her for Mr. Sacrey's 2004 and 2005 wills because he was a professional person acting in the place of a lawyer doing that work."

The duty of care was not defeated under the second branch of the *Anns* test, which deals with public policy considerations that would weigh against a duty of care, because it was in the public interest that professional accountants who undertake to create wills do so with care not only for the best interests of their clients but also for the intended beneficiaries under those wills.

Because the accountant could have (and likely should have) declined to do work he was not competent or qualified to do; because, as a professional, he should have understood the limits of his competence; and because he chose not to decline the work, the court held that the standard of care applicable was that of "…an ordinarily competent solicitor in these circumstances." Handrigan J. then compared the accountant's work with the work of typical lawyers, as provided in evidence − including the lawyer who had prepared earlier wills for the testator − and found that with respect to knowledge and compliance with the requirements of the *Wills Act*, the accountant's work did not meet the requisite standard of care.

The court held that the accountant and his employer firm jointly and severally liable to the plaintiff in the amount of the bequest − $100,000 – plus her costs.

This case is not the first, in Canada, in which improper execution of a will led to a finding of negligence against a will drafter. In the 1978 decision in *Whittingham v. Crease*[8], the court found a lawyer negligent for allowing the spouse of an intended beneficiary to witness a will, contrary to the British Columbia *Wills Act*. In 1980, the same error was

[4] (2007) SCC 41 (CanLII)
[5] 2003 SCC 69 (CanLII)
[6] 2000 SKCA 1 (CanLII)
[7] [1995] 1 All E.R. 691 (H.L.)
[8] (1978), 88 DLR (3d) 353 (BCSC)

committed by a lawyer in England, resulting in a finding of negligence against him in the decision in *Ross v. Caunters*[9].

Viewed narrowly, the lesson to be taken from these cases is that while traditional formalities are disappearing from many aspects of legal work, lawyers must respect the formalities that remain. A person who undertakes to prepare a will and to supervise its execution must familiarize him or herself with the requirements of the law in effect in the relevant jurisdiction, and must carefully comply with those, or else risk full liability to make good on failed bequests.

The broader lesson, of course, is that it's risky, for lawyers and non-lawyers alike, who are NOT sufficiently familiar with wills and estates laws in a given jurisdiction to draft wills as an "ancillary service" to some other kind of work. No matter how good the precedent upon which these dabblers might rely, if a will is not executed in compliance with formal requirements, it's no will at all.

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[9] [1980] 1 Ch.297