# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Freda M. Steel
Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre

***B E T W E E N :***

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| ***JAMES HUNTER GARWOOD*** | ) | |
| | ) | |
| *(Applicant) Appellant* | ) | |
| | ) | ***D. G. Ward, Q.C.*** *and* |
| *- and -* | ) | ***E. N. Blouw*** |
| | ) | *for the Appellant* |
| ***JAMES HUNTER GARWOOD AS EXECUTOR OF THE ESTATE OF JESSIE GARWOOD*** | ) | |
| | ) | ***D. G. Ward, Q.C.*** *and* |
| | ) | ***E. N. Blouw*** |
| *(Respondent) Respondent* | ) | *for the Respondent James Hunter Garwood as Executor of the Estate of Jessie Garwood* |
| *- and -* | ) | |
| ***B E T W E E N :*** | ) | |
| | ) | |
| ***KAREN GARWOOD*** | ) | ***R. W. Schwartz*** *and* |
| | ) | ***M. A. Pohl*** |
| *(Applicant)* | ) | *for the Respondent Keith G. Collins Ltd., Trustee of the Estate of Karen Laird Watson (also known as Karen Garwood)* |
| *- and -* | ) | |
| ***JAMES HUNTER GARWOOD AS EXECUTOR OF THE ESTATE OF JESSIE GARWOOD*** | ) | |
| | ) | *Appeal heard:* |
| *(Respondent)* | ) | ***March 7, 2017*** |
| | ) | |
| *- and -* | ) | |
| | ) | *Judgment delivered:* |
| ***B E T W E E N :*** | ) | ***July 5, 2017*** |
| | ) | |
| ***KEITH G. COLLINS LTD., TRUSTEE OF THE ESTATE OF KAREN LAIRD*** | ) | |

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| ***WATSON (also known as KAREN GARWOOD)*** | ) |
| | ) |
| *(Applicant) Respondent* | ) |
| | ) |
| *- and -* | ) |
| | ) |
| ***JAMES HUNTER GARWOOD AS EXECUTOR OF THE ESTATE OF JESSIE GARWOOD*** | ) |
| | ) |
| *(Respondent) Respondent* | ) |

On appeal from 2016 MBQB 113

**LEMAISTRE JA**

[1] James Garwood appeals the decision upholding the validity of his mother's Will. In reaching that conclusion, the trial judge found that, despite Jessie Garwood's visual impairment, it was not necessary for the Will to have been read to her verbatim prior to her signing it. She held that the Will reflected the intentions of Jessie and that the residuary clause in the Will which purported to divide the residue of the estate between James and his then wife, Karen Garwood, was not uncertain.

[2] In my view, the trial judge applied the correct law and made no palpable and overriding error in reaching her conclusion. Thus, for the reasons that follow, I would dismiss the appeal.

Background

[3] Jessie executed her Will in July 2000. She died in February 2004. James, the executor of the Will, applied for and was granted probate in August 2004.

[4] The Will included a number of uncontentious specific bequests. However, it also contained the following residuary clause which is at the heart of these proceedings:

> To give the rest and residue of my estate to my son [James] and his wife [Karen] provided that [they] are residing together as husband and wife as of the date of my death failing which the rest and residue of my estate shall be paid solely to [James].

[5] Although she was married to James at the time of Jessie's death, in November 2004, after probate had been granted, Karen separated from James. She then applied to the Court for direction and payment of her portion of the estate because she had not yet received it in accordance with the residuary clause. This application started a circuitous path of litigation.

[6] In response to Karen's application, James applied to revoke the grant of probate. He alleged that Jessie did not know and approve of the contents of the Will. In his application, James sought to have the Will declared invalid and probate revoked. He also sought to have the residuary clause declared invalid.

[7] After a number of failed attempts to have the matter determined by affidavit evidence (see *Garwood v Garwood Estate*, 2007 MBCA 160; and *Garwood v Garwood*, 2013 MBQB 133), the trial finally commenced in November 2015. Prior to the commencement of the trial, Keith G. Collins Ltd. became a party to the proceedings as Karen's trustee pursuant to an assignment in bankruptcy.

[8] At the trial, it was uncontroverted that, at the time that she signed the Will, Jessie's vision was significantly impaired. It was agreed that there

were drafting errors in the Will. It was also agreed that Jessie had provided written instructions to her lawyer, Dan Orlikow, which included a number of specific bequests, which appeared in the Will and a specific bequest to James for $150,000, which did not appear in the Will. All of the above raised issues regarding whether Jessie had ever read the Will or had it read to her and whether ultimately, she was aware or approved of the contents of the Will. In addition, concerns were raised as to the meaning of the residuary clause and whether it was void for uncertainty.

[9] In response to these issues, Mr. Orlikow testified that Jessie provided him with written instructions which they discussed at a meeting in his office. He said that he made notes on the written instructions and then used the instructions to prepare Jessie's Will. The written instructions with Mr. Orlikow's notes were filed as an exhibit at the trial. Mr. Orlikow said that, during his meeting with Jessie, she indicated an intention to leave the residue of her estate to James and his wife, Karen, provided they were still together at the time of her death, rather than to leave a specific bequest to James. As a result, he drafted the residuary clause which he put in the Will instead of the specific bequest for James. He said that he had never drafted such a clause previously, nor had he done so since, and he was unsure of how to word the clause in order to give effect to Jessie's intentions.

[10] He also stated that, when he met with Jessie on a subsequent occasion to execute the Will, he was aware that she had a visual impairment and so he read the Will aloud upside down while she read along with him before she signed it. He said that this was the case even though the executed Will contained a number of drafting errors.

[11] The trial judge found that the Will was validly executed but that suspicious circumstances surrounding its preparation negated the presumption that Jessie possessed the requisite knowledge and approval required for a valid Will. The suspicious circumstances found by the trial judge included "[t]he conflicting evidence regarding Jessie's visual impairment and her ability to read, the obvious drafting errors in the Will, and Mr. Orlikow's inconsistent and unreliable evidence regarding his meetings with Jessie" (at para 60). However, after considering the totality of the evidence in context, the trial judge was satisfied that Jessie knew and approved of the contents of the Will. She also found that the residuary clause did not fail for uncertainty. Finally, the trial judge found that proof of knowledge and approval of the contents of a Will does not require it to be read verbatim prior to execution. Accordingly, the trial judge declared the Will, the grant of probate and the residuary clause to be valid and ordered that James "is not entitled to receive an additional sum of $150,000.00 (or any other sum) from the proceeds of the said estate."

Issues

[12] James appeals the trial judge's decision and lists 11 grounds of appeal. The main issue in this case is whether the trial judge erred in finding that the Will was valid. A determination of this issue involves whether, in the circumstances of this case, the Will had to be read verbatim to Jessie, whether the Will reflected her intentions and whether the residuary clause could be properly construed or whether it failed for uncertainty.

Standard of Review

[13] Whether the trial judge erred in finding that the law does not

require a Will to be read verbatim is an issue of law and subject to review on a standard of correctness. The remaining issues are mixed fact and law and are reviewable on the standard of palpable and overriding error. See *Zindler v The Salvation Army et al*, 2015 MBCA 33 at para 10.

Discussion

*Did the Will need to be read verbatim prior to execution in order to be valid?*

[14] The legislative requirements for the execution of a Will are set out in sections 3 and 4 of *The Wills Act*, CCSM c W150, and in rr 74.02(3) and 74.02(4) of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88 (see appendix). In *Vout v Hay*, [1995] 2 SCR 876, the Supreme Court of Canada held that a Will has to be "read over to or by a testator who appeared to understand it" in order for it to "be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity" (at para 26). After considering the legal requirements for the application of the presumption, the trial judge found that a verbatim reading of the Will was not required and that what was important was that there be proof "that the testator or testatrix knew of and understood the contents of the [W]ill" (at para 41).

[15] Relying on *Vout* and *Schatz (Re)*, 1976 CarswellSask 68 (QB), James argues that the trial judge misinterpreted the law when she found that the Will did not need to be read over verbatim to Jessie by her lawyer on account of Jessie's visual impairment in order to ensure she understood its contents.

[16] *Schatz* was a decision of the Saskatchewan Surrogate Court. It involved a testatrix who spoke German and who was not comfortable with English. She executed her Will by mark. The Court found that section 38(2) of *The Surrogate Court Act*, RSS 1965, c 75, which dealt with a testator who is a marksman or blind, required the Will to be read verbatim in order to satisfy the need for "proof . . . that before its execution the [W]ill was read over to the testator and that he had knowledge of its contents and appeared perfectly to understand the same."

[17] However, *Schatz* has not been relied upon by any other court and, as noted by the trial judge (at para 40):

> ***Re Schatz*** deals with the provision of a statute rather than a rule of court where the court has some discretion to dispense with strict compliance, a factor that the court refers to (at p. 552). Indeed, the statute has since been repealed and proof of execution is now addressed in Saskatchewan's Court of Queen's Bench Rules. Finally, as the court notes, failure to have the [W]ill read over to the testator does not mean that the [W]ill cannot be proved in solemn form (p. 552).

[18] In *Sikora Estate (Re)*, 2015 ABQB 374, an application to declare a Will invalid was dismissed because it was not brought within the limitation period. Citing *Jackson et al v King et al*, 2006 BCSC 749, the Court stated that the application would have been dismissed regardless, since "[b]lindness does not disqualify individuals from making a [W]ill" (at para 5). The Court explained that (at para 42):

> The common law has always held that the key to the validity of a [W]ill is not having sufficient sight to read it, or sufficient education to be able to read and understand it, but whether the testator fully understood what was in the [W]ill and whether the

> [W]ill as written represented the testator's intentions. It has never even been necessary that the [W]ill be read over to a blind testator.

[19] Demonstrating that a testator read the Will or had the Will read to him is not necessary to prove knowledge and approval of the Will if there is other satisfactory evidence available. See, for example, *Barry v Butlin*, [1838], 12 ER 1089 where the Court explained (at pp 485-86):

> Nor can it be necessary, that in *all such cases*, even if the Testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the Will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the *most* satisfactory, but they are not the *only* satisfactory description of proof, by which the cognizance of the contents of the Will, may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a Will without it, but it has no right in every case to require it.
>
> [emphasis in original]

[20] Similarly, in *Re Souch*, 1937 CarswellOnt 68, the Court held that "the absence of a reading over of the [W]ill and codicils does not invalidate it" (at para 11). In that case, the testatrix's eyesight was so affected that she could not read or write.

[21] In some cases, evidence that a Will was read clause by clause or verbatim may amount to proof of knowledge and approval of the contents of a Will. See for example *Faulkner v Faulkner*, [1920] 60 SCR 386; and *Sommer v British Columbia (Public Guardian and Trustee)*, 2015 BCSC 1947. However, in *Franks v Sinclair & Ors*, [2006] EWHC 3365 (Ch), the Court found that verbatim reading of the Will without explanation by counsel did not establish knowledge and approval of its contents by the

testatrix where a clause was "expressed in the customary technical language of [W]ills, which most lay people will find impenetrable" (at para 65). If a testatrix does not speak English fluently, an explanation will not be sufficient to establish she had knowledge and approval of the contents of the Will. See *Kaczmarczyk v Kaczmarczyk*, 1997 CarswellOnt 3116.

[22] In my view, proof of a verbatim reading of a Will is not a prerequisite to establishing knowledge and approval. In many cases, it will be sufficient to show that the lawyer summarized and explained the contents of the Will to the testator prior to execution. Ultimately, it is a question of fact as to whether the particular words in question were brought to the attention of the testator and adopted by him as his words. In my view, the trial judge correctly stated the law and, therefore, I cannot say that she erred.

*Did the Will reflect Jessie's intentions and was the residuary clause void for uncertainty?*

[23] James argues that the trial judge erred when she found that Jessie knew and approved of the contents of the Will and that the residuary clause was not void for uncertainty.

[24] The trial judge referred to inconsistencies in the evidence as to whether Jessie could read when she executed her Will, drafting errors in the Will and Mr. Orlikow's evidence regarding the preparation and execution of the Will as a basis to invoke the doctrine of suspicious circumstances. She then reviewed the evidence to determine whether the Will reflected Jessie's intentions.

[25] The trial judge noted that Mr. Orlikow was "[t]he only person who

could give any evidence about Jessie's knowledge, understanding and approval of the contents of the Will" (at para 65). However, she found his evidence to be unreliable. She had the following to say about Mr. Orlikow's evidence (at para 23):

> It was at times vague, contradictory, and confused. I was left with the impression that Mr. Orlikow had little actual memory of his meetings with Jessie, despite his assertion to the contrary. This would not be surprising given the passage of time and the number of [W]ills he prepared for different clients in any given year. At times, Mr. Orlikow claimed a specific recollection of his meetings with Jessie. At other times, it was clear that Mr. Orlikow was giving evidence based on his usual practice with clients or his view on what would have been reasonable. . . . It became obvious that Mr. Orlikow simply did not have a clear or reliable recollection of his meetings with Jessie.

[26] The trial judge found that, even though he met with her at least four times, there were "no notes about Mr. Orlikow's meetings with Jessie" (at para 18); he did not have a copy of the Will instructions or the Will; he wrote in a letter to James in September 2005, that he did "not have any specific recollection as to matters concerning the execution of the Will" (at para 20), but he testified that this was not true, and he was inconsistent in his evidence as to whether Jessie had any difficulty reading the Will in his office. The trial judge referred to Mr. Orlikow's testimony that he was guessing and found that, "Mr. Orlikow simply did not have a clear or reliable recollection of his meetings with Jessie" (at para 23).

[27] In the end, the trial judge found that the "absence of reliable direct evidence" required her to "draw reasonable inferences from circumstantial evidence" (at para 66). Based on the evidence, the trial judge inferred that Jessie had some ability to read at the time that she executed the Will. She

found that the Will was consistent with the Will instructions and that "[t]he notations included by Mr. Orlikow on the Will instructions . . . support[ed] [his] evidence that the residuary clause was added to the Will and James named as a residual beneficiary in lieu of the specific bequest" (at para 43). She found that the drafting errors were not "errors of substance" (*ibid*) and that Mr. Orlikow "would have reviewed the provisions of the Will with Jessie, as was his practice" (at para 28). She also found that Jessie's character and experience was such that she would not have signed the Will unless she understood and approved of its contents. Finally, she found that the residuary clause was not void for uncertainty and she rejected the argument that Jessie would not have understood or approved of the clause as written.

[28] The inferences drawn and the findings of fact made by the trial judge were all available on the evidence and, in my view, were not the result of palpable and overriding error. I have not been persuaded that the trial judge erred in finding that the Will reflected Jessie's intentions and that the residuary clause was not void for uncertainty.

[29] For these reasons, I would dismiss the appeal with costs.

leMaistre JA

I agree: Steel JA

I agree: Cameron JA

# APPENDIX "A"

*The Wills Act*, CCSM c W150

**Writing required**
**3** A will is valid only when it is in writing.

**Signatures required**
**4** Subject to sections 5 and 6, a will is not valid unless,

(a) at its end it is signed by the testator or by some other person in the presence and by the direction of the testator;

(b) the testator makes or acknowledges the signature in the presence of two or more witnesses present at the same time; and

(c) two or more of the witnesses attest and subscribe the will in the presence of the testator.

Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88

**Proof of execution of will**
**74.02(3)** On a request for probate or administration with the will annexed the execution of the will shall be proved by affidavit of one of the subscribing witnesses in Form 74F or otherwise as directed by the court.

**Proof to include reading of will**
**74.02(4)** Where the testator or testatrix executed the will making his or her mark, or where the will was signed for the testator or testatrix by some other person in his or her presence and by his or her direction, the proof shall show that, before its execution, the will was read over to him or her and that he or she had knowledge of its contents and appeared to understand them.