

Case Name:

## **Slater v. Slater**

IN THE MATTER OF the Estate of Helen Jean Slater,  
deceased

Between

James Slater and Michael Slater, applicants, and  
Victor Slater et al., defendants

[2004] O.J. No. 4054  
Court File No. 01-2546/02

### **Ontario Superior Court of Justice Wilton-Siegel J.**

Heard: May 13, 2004.  
Judgment: October 5, 2004.  
(39 paras.)

*Wills — Testamentary instruments — Preparation and execution — Evidence and proof — Practice — Judgements and orders — Summary judgements — Bar to application, existence of issue to be tried.*

Motion by the executors for an order of summary judgment with respect to the validity of the testatrix's will. Victor argued that James had exercised undue influence over the testatrix. However, the only evidence was Victor's unsupported allegations to this effect. Relying on two isolated mistakes about relations, he also made allegations respecting the possible onset of dementia or other incapacitating conditions, despite not having seen the testatrix for six years. The testatrix's doctor of fifteen years stated that he never formally assessed her mental status as he never felt there was any indication to do so. According to Reagan, who had prepared the will, one of the mistakes was simply a typographical error on his part. Reagan, also testified that the testatrix had not intended to make Victor an executor. Victor also alleged that the front page of the will had been changed to the present version. He pointed to the inclusion of Renwick's children as beneficiaries. He relied on the affidavit of the testatrix's friend, who stated that the testatrix had asked her for Reagan's phone number while they were on a trip because she wanted to do something for Renwick's children. However the friend could not confirm that a call was made to Reagan. Reagan was not qualified to prepare a will.

**HELD:** Motion allowed in part. There was a genuine issue for trial on whether the will was the will executed before Reagan or if a page of the will had been changed. The

testimony of the friend could not be disregarded nor could the fact that the will did contain a provision consistent with the intention of including Renwick's children. Findings of fact on a critical issue which went to the validity of a will, and which invoked the Court's inquisitorial function as a surrogate court, should be left for the trial judge. There was also the issue of Reagan's involvement in the preparation of the will and his credibility. With respect to Victor's allegations of undue influence and lack of testamentary capacity, he had not established a genuine issue for trial. Accordingly, the motion for summary judgment on these issues was granted.

**Statutes, Regulations and Rules Cited:**

Ontario Rules of Civil Procedure, Rules 1.04(1), 1.04(2), 20, 75.06, 75.06(3)(d).

Trustee Act, R.S.O. 1990, c. T.23.

**Counsel:**

Susan J. Stamm, for the applicants.

Larry J. Levine, Q.C., for the respondent.

**WILTON-SIEGEL J. (endorsement):—**

Preliminary Issue

1 The respondent, Victor Slater (herein the "respondent"), argued that the Court does not have authority to grant summary judgment on a Rule 20 motion in contentious estate proceedings. He says that the general rule, as articulated by Pardu J. in *Knox v. Trudeau* (2001), 38 E.T.R. (2d) 67, [2001] O.J. No. 352 at para. 13 (Sup. Ct.), is that, "where an order for trial of issues has been made pursuant to rule 75.06, there is no authority in the Contentious Estate Proceedings rules permitting a litigant to seek summary judgment based on the insufficiency of the plaintiff's case, as revealed by examinations under oath." In addition, he argues that the consent order of Lissaman J. dated July 3, 2003 (the "Order") is a contract which cannot be varied in a fundamental manner without consent. In support, he relies on *Chitel v. Rothbart* (1984), 42 C.P.C. 217, [1984] O.J. No. 2238 (H.C.J.), which says that a consent order is in the nature of a contract and should be enforced unless the agreement was unfair or unreasonable, or a mistake was made.

2 The applicants argue that summary judgment has been granted in at least three contested estate cases, although it is conceded that the issue of authority was not specifically addressed in those decisions. They argue that the Court has authority based on the provisions of rules 1.04(1), 1.04(2) and 75.06(3)(d). The applicants argue that the right to have a will proven in solemn form has been supplanted by the provisions of rule 75.06. In addition, they argue that paragraph 16 of the Order provides sufficient authority, by agreement of the parties, to permit the applicants to apply to the Court for an amendment to the Order allowing the issues for trial to be determined by a Rule 20 motion.

3 I conclude that the Court has authority to allow the applicants to bring a Rule 20 motion under paragraph 16 of the Order. The Order requires that there be a trial of certain identified issues. It was granted at an early stage of the proceedings. In such

circumstances, a liberal reading should be given to the word "trial" to encompass any other judicial proceedings that, on application by any of the parties pursuant to paragraph 16, the Court may determine to be appropriate to resolve the action, including a Rule 20 motion. To the extent it is necessary, it is also ordered that paragraph 16 of the Order is hereby amended to allow the applicants to bring this motion.

4 On this basis, it is unnecessary to address the general issue raised in Knox. However, I am of the view that a Court has authority under the Rules of Civil Procedure to grant summary judgment on a Rule 20 motion in a contentious estate proceeding. This intention is evidenced in rule 75.06(3)(d). I note that Cullity J. reached a similar conclusion in *Ettorre v. Ettorre Estate* [2004] O.J. No. 3646 (Sup. Ct.) in a decision rendered after the hearing of the present motion. I would acknowledge, however, as the applicants did, that a genuine issue for trial would exist if there is any evidence which suggests the lack of testamentary capacity or the presence of undue influence. The subtleties of proof of such matters, as well as the inquisitorial function of a surrogate court, call for a cautious approach by the Court on such issues. I believe, as well, that a Court should not grant summary judgment in circumstances in which it is not satisfied that a full evidentiary record has been placed before it, even if the facts before the Court do not reveal a genuine issue for trial.

#### Summary Judgment Issues

5 The applicants seek summary judgment in respect of the six issues identified in the Order. I will deal with the four principal issues raised on this motion separately and then address the status of the remaining issues. For purposes of these reasons, the "Will" refers to the document attached as Exhibit "A" to the affidavit sworn February 17, 2004 by James Slater included in the applicants' motion materials.

6 In addition, the applicants sought summary judgment declaring that the assets set out in the Acknowledgement dated March 28, 2002 were properly excluded from the estate. It is agreed, however, that this issue is not the subject of the Order or the Statement of Claim and therefore the issue was not addressed on this motion.

#### Undue Influence

7 The respondent acknowledged that he had no additional evidence beyond that set out in the motion materials in support of his assertion that James Slater exercised undue influence in respect of the Will and conceded that there was no genuine issue for trial on this issue.

8 I agree with the applicants that there is no evidence, other than unsupported allegations of the respondent in his affidavits, to support a cause of action based on undue influence. These allegations do not establish a genuine issue for trial. The applicants are entitled to summary judgment in respect of this issue.

#### Testamentary Capacity

9 I understand testamentary capacity to address whether the testator was capable of understanding, on his or her own initiative and volition, the essential elements of will-making including the property subject to the will, the objects of the will, the persons who would "normally" be expected to be beneficiaries of the estate, and the revocation of prior

testamentary dispositions. Proof of testamentary capacity includes proof that the testator had knowledge of, and approved of, the contents of the will.

10 The applicants say that there is substantial evidence that Mrs. Slater had testamentary capacity. She was physically robust, as evidenced by her trips to Thailand and Newfoundland, her continuing to drive and her achievement of climbing the stairs of the CN Tower. Mrs. Slater's family doctor of fifteen years stated in a note that he never formally assessed her mental status as he never felt there was any indication to do so and that he never found her forgetful or wandering intellectually. In another note, the doctor indicated that he never felt she suffered from any noticeable mental impairment and that he marvelled at her energy and abilities. Sixteen months before she died, he certified her as capable of living independently and taking care of herself in a senior's apartment building.

11 The respondent makes unsubstantiated allegations in his affidavit respecting the possible onset of dementia or other incapacitating conditions. However, he had not seen Mrs. Slater for six years, he provided no medical evidence in rebuttal and he did not cross-examine Mrs. Slater's doctor.

12 The respondent's position rests on the reference in the Will to Michael as Mrs. Slater's son when he was her nephew. The respondent says this is an example of a non-lucid moment in Mrs. Slater's mental condition. Although it was not argued on the motion, I have also considered whether the fact that Mrs. Slater may have failed to remember the treatment of Scott Renwick's children under the Will constitutes further evidence of a non-lucid moment. This fact presumes that the Will is the will executed in the office of Gerald Reagan ("Reagan") and that Reagan made no further change to the Will.

13 Are these circumstances enough to raise a genuine issue for trial or to otherwise require a trial of the issues of testamentary capacity? In the absence of any evidence that these two isolated mistakes formed part of a pattern of mistakes or forgetfulness that is suggestive of a lack of testamentary capacity, I conclude they do not give rise to a genuine issue for trial.

14 On the evidence before the Court, the mistaken reference to Michael as her son was an isolated event. The evidence regarding Mrs. Slater's statement to Mrs. Dean about the Fenwicks is equivocal and unreliable. It is susceptible of several interpretations, is significantly influenced by Mrs. Dean's guesses as to what Mrs. Slater meant and is highly speculative on the specific issue of whether Mrs. Slater believed she required a new will to include provisions that were already addressed in the executed will.

15 I would add that there is no evidence of suspicious circumstances that would place a greater burden on the applicants, as the propounders of the Will, to prove testamentary capacity. Neither James Slater nor Michael Slater had any involvement in the instructions given to Reagan when he prepared the will executed in his offices, and neither was present when the Will was executed.

16 Accordingly, the motion for summary judgment on this issue is also granted.

Appointment of Executors

17 The respondent says that the reference to Michael Slater as one of Mrs. Slater's sons in the appointment of executors in the Will also indicates that Mrs. Slater intended to appoint the respondent as an executor.

18 The applicants say that Reagan's testimony on cross-examination indicates that the reference to Michael Slater as one of Mrs. Slater's sons resulted from a typographical error on Reagan's part. In any event, Reagan's evidence is that Mrs. Slater did not intend to make the respondent an executor. The applicants say it would be unreasonable to expect that Mrs. Slater would have appointed the respondent an executor when she did not intend to leave any of her estate to him.

19 As a matter of law, the applicants argue that, even if the principle in *Knox* were otherwise applicable in respect of contested estate proceedings, the Court has authority to address this issue on a summary judgment motion as determination of the issue involves a pure question of interpretation of the Will.

20 I agree with the applicants that this is a matter which the Court can address on a summary judgment motion although I do so on the basis that there are no facts in dispute rather than as a matter of interpretation of the Will. The applicant has provided evidence from Reagan that the Will reflects the intention of Mrs. Slater that Michael Slater was to be an executor rather than the respondent. The respondent has offered no contrary evidence. There is no genuine factual issue for trial on this matter.

21 Accordingly, the motion for summary judgment on this issue is also granted.

#### Integrity of the Will Before the Court

22 There is no issue that Mrs. Slater duly executed a will in the presence of Reagan and the other witness, Alan Dorland, who subscribed the will in the presence of the testator. The issue in this action, however, is whether Reagan "slip sheeted" the first page of that will at some point after its execution as a result of a telephone call from Mrs. Slater. If he did so, the Will does not represent the last will and testament of Mrs. Slater as it cannot be said to have been duly executed.

23 The respondent says that there is a genuine issue for trial on this matter. He relies on the affidavit of Mrs. Dean included in the motion materials and Mrs. Dean's testimony on her cross-examination.

24 In her affidavit, Mrs. Dean says that, during the trip she and Mrs. Slater took to Newfoundland, Mrs. Slater asked her for Reagan's toll-free number saying she wanted to call Reagan to tell him she wanted "to do something financially for Scott's children." The Will in fact addresses Scott Renwick's children. From this, the respondent says there is evidence on which the Court could find that the call took place and the front page of the previously executed will was changed to the present version.

25 The respondent admits Mrs. Dean's testimony on cross-examination is somewhat contradictory. Mrs. Dean says she was not aware that Mrs. Slater had made a will and assumed she wanted to set up a fund for Scott Renwick's children. She says she gave Reagan's number to Mrs. Slater and left the room to allow Mrs. Slater to make a private call. She could not confirm that a call was made to Reagan. Later in her cross-examination, she testified she assumed that Mrs. Slater wanted to get in touch with

Reagan in connection with a will including the two individuals and that she heard that Reagan had drafted a will for Mrs. Slater. She further testified that Mrs. Slater said that she was going to get a new will to include Scott Renwick's sons.

26 The applicants make three arguments in support of their position that the evidence does not identify a genuine issue for trial. They say, first, that there is no evidence that Mrs. Slater ever called Reagan and some evidence from CIBC that she did not, as the CIBC records of the toll-free number do not reveal such a telephone call. Second, they say that James Slater found the Will in Mrs. Slater's house. In the absence of evidence that James Slater and Reagan conspired to change the will, they say this fact strongly indicates the will executed before Mrs. Slater left on her trip was not changed before her death. As a related matter, they say further that there was no motive or incentive to James Slater for engaging in any conspiracy with Reagan. Third, they say Reagan was never asked on his cross-examination if he "slip sheeted" the first page of the Will.

27 I have concluded there is a genuine issue for trial on whether the Will is the will executed before Reagan. I reach this conclusion for the following three reasons.

28 First, I do not believe that I can disregard the testimony of Mrs. Dean. Her testimony is certainly capable of the interpretation placed upon it by the respondent that Mrs. Slater intended to call Reagan to change her will to include a provision in favour of Scott Renwick's sons. In the absence of direct evidence that the will executed by her was not changed during her trip to Newfoundland, the Court must consider the significance of the fact that the Will does contain a provision consistent with this intention.

29 The applicants say the only explanation for a change in the will would be a conspiracy that is denied by both James Slater and Gerald Reagan and for which there is no evidence. They argue that the Court should find that the will was not changed based on the facts that James Slater found the Will in Mrs. Slater's home after her death and that there is no evidence of a conspiracy between James Slater and Reagan.

30 In order to grant summary judgment on this issue, I believe that the Court must find that the fact that the Will was found in Mrs. Slater's house after her death excludes any possibility of a change in the will during her trip. While I am inclined to agree with the applicants on this issue, I do not believe the Court should make this finding by way of inference on a summary judgment motion where the validity of a will is the central issue. Findings of fact on a critical issue which goes to the validity of a will, and which invoke the Court's inquisitorial function as a surrogate court, should be left for the trial judge.

31 Second, the manner in which the sons of Scott Renwick were dealt with in the Will is sufficiently unique and specific to their circumstances that it might be expected that Mrs. Slater would have remembered its inclusion in the will executed by her. As I understand the Will, Mrs. Slater made provisions for these individuals by returning a Dundalk property she received in an earlier loan transaction. Reagan would probably have received an explanation of the background to this provision in the Will in order to set out the intention correctly. The fact that Mrs. Slater may not have remembered this element of the will-making process may suggest that it did not occur when she executed the will in Reagan's office before her trip.

32 Third, I am troubled by Reagan's involvement in the preparation of the Will. He was unqualified and acted beyond the scope of his relationship with Ms. Slater. It was inappropriate for him to have prepared a will however well intended. While there is no direct evidence that he made any change to the will executed by Mrs. Slater in his presence, there is also no certainty that he understood the consequences of changing pages of a will on telephone instructions from a client. There is also evidence before the Court that complaints against Reagan have been initiated by the respondent under applicable securities regulations as well as with the Law Society of Upper Canada. In these circumstances, I think there is a possible concern for Reagan's credibility as to any actions subsequent to the execution of the will, which should be addressed by a trial judge.

[The Court had inserted a paragraph number 33 here. LexisNexis Canada has removed the number but has retained the Court's subsequent paragraph numbering.]

34 In reaching the conclusion that a genuine issue for trial exists, I am not, however, suggesting that I am persuaded by the respondent's evidence on a balance of probabilities standard. Indeed, I think the applicants' position is much stronger in the absence of any suggestion of a conspiracy between Reagan and James and any evidence that Mrs. Slater ever spoke to Reagan. In addition, it should be noted that Mrs. Dean's testimony is also susceptible of several different interpretations which do not support the respondent's position, including the possibility that Mrs. Slater had a totally new or different arrangement in mind for the sons of Scott Renwick from that set out in the Will or that she intended to revise the arrangements she made to allow payment to occur while the individuals were at university.

#### Other Matters

35 The parties have agreed that it is appropriate to grant Stanley Weisman, Q.C., Estate Trustee During Litigation, the power to invest monies held in his trust account in accordance with the terms of the Trustee Act, R.S.O. 1990, c. T.23, as amended. It is so ordered.

36 The parties have also agreed that it is appropriate to grant the Estate Trustee During Litigation the authority to take control of the contents of a safety deposit box, bearing the number 787, located at the Toronto-Dominion Bank branch at 689 Evans Avenue, Toronto, Ontario. This is also ordered.

37 The applicants also sought summary judgment to the following effect:

1. That the residual estate forms a partial intestacy (the "Partial Intestacy") by virtue of there not being a residual clause in the Will and with respect to the sharing of the assets of the Partial Intestacy;
2. That the estate expenses should be paid from assets forming the Partial Intestacy and, therefore, to the extent necessary, apportioned between the beneficiaries of the Will on a pro-rata basis; and
3. Directing the registrar to issue a Certificate of Appointment of Estate Trustee to James Slater and Michael Slater in accordance with their application filed in this Court.

38 In view of the decision set out above that a genuine issue for trial exists, it is unnecessary and probably premature to address these issues on the motion and I decline to do so.

#### Costs

39 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter in accordance with the following schedule. The applicants shall deliver a copy of their submission to the respondent within 15 days of the date of these reasons. The respondent shall deliver a copy of its submission to the applicants within 10 days of receipt of the applicants' submission. The applicants shall file with the Court a bound volume containing the two submissions and any reply submission within five days of receipt of the respondent's submission. Any such submissions seeking costs shall identify all lawyers on the matter, their respective years of call and rates actually charged to the client and shall include supporting documentation as to both time and disbursements.

WILTON-SIEGEL J.

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