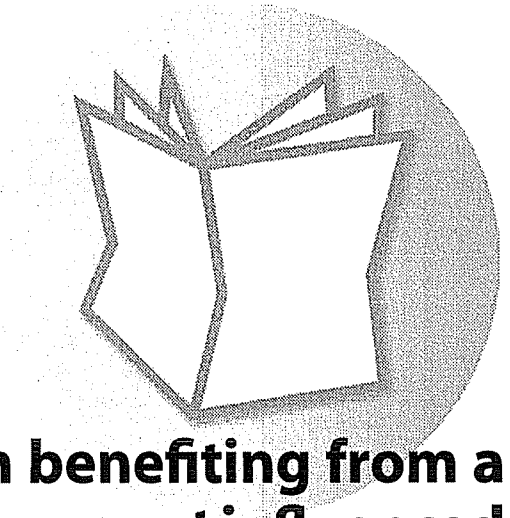

Preventing an N.S. killer from benefiting from a Will; Quebec Court finds Boxer was not influenced by his second wife; Ensuring that tax-planning is part of the Will; Establishing admissible evidence for Will interpretation; New family law legislation in B.C. will impact 'family property'

N.S. COURT TAKES COMMON SENSE APPROACH TO PREVENTING KILLER FROM BENEFITING FROM A WILL

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The recent case of *Jollimore Estate v. Nova Scotia (Public Archives)* provides a fresh treatment of the long-established rule of public policy that prevents killers from benefiting from their crimes. At common law, a beneficiary who kills a testator cannot take a gift under the Will. Only if the killer suffered from a mental disorder, can he—or anyone claiming through him—take under the victim's Will. The same principle applies to intestacy, insurance proceeds, and joint property.

The facts of this case are tragic. Police found the bodies of Roberta Jollimore and her son, Gregory, inside their home. Roberta had been strangled, and Gregory died from asphyxiation. himself. The Court subsequently concluded that Gregory had killed his mother, then himself.

Mother and son left almost mirror Wills, each leaving everything to the other. If Roberta predeceased, Gregory's estate would pass to a charity. If Gregory predeceased, Roberta's estate would pass to the Public Archives of Nova Scotia. Although they were survived by three of Roberta's siblings and her nephew, neither made any provision for them. They appointed one another as executors, with a professional trustee as the alternate.

Apart from the factual problems of the order and manner of death, which were resolved based on the forensic evidence, the real issues were: If Gregory had killed Roberta, could his estate take under her Will? If his estate could not benefit due to public policy, could the Archives, the alternate residual beneficiary, take?

Specifically, Roberta's will stated: If my son, Gregory Ross Jollimore, has predeceased me I give all of my estate, both real and personal and wheresoever situate to the Public Archives of Nova Scotia. But Gregory, having first killed Roberta and then himself, had not predeceased her. The will contained no survivorship clause. The question then arose: Was the gift to the Public Archives conditional on Gregory's predeceasing his mother?

The siblings and nephew argued that the Will's language was clear: the Archives could only take if Gregory predeceased his mother. If he did not, the gift should fail. In response, the Archives reasoned that Roberta could not have anticipated that her son would not inherit because he had killed her. Her intention was clear. If her son did not inherit her estate, the Archives should.

This was the first case of its type in Nova Scotia. Courts in other jurisdictions have gone both ways. Some have taken a very literal approach. Where the alternate gift depends on the killer predeceasing the victim and the killer survives, the condition is not met, and the victim's estate passed by way of intestacy.

Other courts, wanting to give effect to the alternate gift, have reasoned in a fashion so as to reach that result. One case found that the testator's intention was to benefit her husband on the condition that he survived her. That condition was met, but the Court inferred that she also intended him to be a lawful beneficiary. He was not a lawful beneficiary, having killed his wife, so the residue passed to the alternate beneficiaries. This has been described as the "implied intention" approach. In another case, the court deemed the killer to have predeceased the victim, with the result that the alternate beneficiaries took under the will. This was described as the "deemed death" approach.

In *Jollimore*, Justice C. Richard Coughlan directed his mind to the testator's intentions. His conclusion, refreshing in its common sense approach as compared with previous courts' reasoning, was that Mrs. Jollimore's will was straightforward—if Gregory Jollimore did not receive her estate, it was to go to the Public Archives. No other parties were mentioned.

To use the words, "If my son, Gregory Ross Jollimore has predeceased me", in the circumstances of this case to find an intestacy would completely ignore Roberta Jollimore's wishes. Thus, the Archives took under the will on first principles of interpretation.

This case represents a departure from overly literal interpretations that result in failure of the gift, on the one hand, and the reasoning of the "implied intention" and "deemed death" approaches, on the other. In this case, a survivorship clause would have solved the problem, but that might not be true if there is a murder but no suicide. Justice Couglan's sensible approach should give practitioners some comfort.

COURT FINDS BOXER VOLUNTARILY SIGNED NEW WILL

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A Quebec Superior Court judge has found the last Will and testament of former boxing champion, Arturo Gatti, signed only weeks before his mysterious death, to be valid (*Gatti c. Barbosa Rodrigues*, 500-17-052555-094, December 16, 2011).

Arturo Gatti died in July 2009, while vacationing in Brazil with his wife and young son. His wife, Ms. Rodrigues, was initially detained for questioning as a suspect in the case but was later released when the Brazilian coroner ruled the cause of death to be suicide.

Gatti's mother, brothers, and daughter from a previous marriage brought an action in Quebec, where Gatti had resided before his death, to nullify the 2009 Will and validate a Will signed in 2007.

The 2009 Will named Rodrigues the universal legatee of Gatti's estate (estimated at $3.4 million), whereas the 2007 will left Gatti's entire estate to the plaintiffs. A signed copy of the 2007 will was never produced, the plaintiffs claiming that Rodrigues had been in possession of the said 2007 Will.

The plaintiffs alleged that Rodrigues had manipulated Gatti and forced him to sign the 2009 Will before a Quebec notary. They alleged that the extreme manipulation of Gatti had the effect of vitiating his consent to the 2009 Will such that it should be set aside. The plaintiffs further alleged that the 2009 Will was signed at a time that Gatti and Rodrigues were separated and preparing to divorce.

In addition, the plaintiffs sought a declaration that Rodrigues was unworthy to inherit Gatti's estate. They alleged that Rodrigues had behaved reprehensibly in controlling her husband and had denigrated his family and friends. Finally, the plaintiffs alleged that Rodrigues had pressured Gatti by threatening to leave him and take their son if he refused to revoke the 2007 Will and sign a new Will making her a universal legatee.

Justice Claudine Roy of the Quebec Superior Court found that Rodrigues had neither controlled nor manipulated Gatti for her own benefit. She also found that although Gatti and Rodrigues had serious, and sometimes violent, disagreements, they had always reconciled. The Court found that Rodrigues had neither isolated Gatti from his family nor denigrated his friends. Furthermore, it was determined that Gatti and Rodrigues were indeed a couple at the time of Gatti's death. The Court held that Arturo Gatti had voluntarily signed the 2009 Will. As such, the 2009 Will was valid and had the effect of revoking all earlier Wills, including that of 2007.

The Court went on to address the plaintiffs' claim that Rodrigues was unworthy to inherit. Article 621 of the *Quebec Civil Code* ("C. C.Q") states that the following persons may be declared unworthy of inheriting: (1) a person guilty of cruelty towards the deceased or having otherwise behaved towards him in a seriously reprehensible manner; (2) a person who has concealed, altered or destroyed in bad faith the Will of the deceased; or (3) a person who had hindered the testator in the writing, amendment or revocation of his Will.

Article 623 C.C.Q provides that only heirs may request such a declaration. As the Court had found the 2009 Will to be valid, Arturo Gatti's mother and brothers were not potential heirs of his estate. As such, they were ineligible to seek such a declaration.

Despite the validity of the 2009 Will, Gatti's daughter from a previous marriage was a potential heir to the estate. However, article 623 C.C.Q. provides that an application for a declaration of unworthiness must be made within one year of the opening of the succession. As Gatti's daughter joined the plaintiffs' action more than two years following her father's death, her request for a declaration of unworthiness was prescribed.

While Rodrigues has won the battle to inherit her late husband's estate, her legal battles are far from over. Gatti's former wife has filed a wrongful death lawsuit against Rodrigues in New Jersey and another lawsuit has been filed against the estate in Florida by a man whom Gatti had previously assaulted.

Only time will tell whether there will be a winner after the final round.

COURT DECISION ILLUSTRATES PLANNING FOR PAYMENT OF TAXES IN A WILL

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A recent decision in the Ontario Superior Court of Justice illustrates the need for specificity when attempting to allocate tax liability amongst the beneficiaries under a Will. Under Canadian income tax law, there is a deemed disposition of assets owned by a deceased individual immediately before death for notional proceeds equal to fair market value.

The resultant capital gain, if any, is reported and included in income in the deceased's terminal period income tax return. The tax liability is therefore a liability of the deceased or rather his/her estate, and in a sense, all beneficiaries will effectively bear a proportionate share of the cost. Where different beneficiaries are left with separate properties, each of which triggers a deemed capital gain upon the deceased's death and the testator wishes to allocate the tax liability, it is necessary to have an understanding of income tax to properly draw the Will.

The case of *Estate of Andrew Stewart Cromarty* 2011 ONSC 6587 was an application by two named beneficiaries for an order determining the extent of their obligation to pay the capital gains tax owing by the Estate with respect to three farm properties owned by the deceased at the time of his death. Each farm was left to a different beneficiary. Farm #2 was bequeathed to the deceased's niece. Farm #3 was bequeathed to friends of the deceased. Farm #1 fell into residue and a nephew was the residual beneficiary under the Will.

Each farm was a "qualified farm property" and therefore eligible for the lifetime capital gains deduction. There was a deemed capital gain in respect of each of the three properties. The aggregate deemed capital gain for the three farms was in excess of the amount that could be sheltered by the available capital gains deduction.

The Will contained a general provision regarding the payment of taxes. All taxes, including capital gains taxes and probate fees, were to be determined as of the date of death and paid from the residue unless otherwise provided in the Will.

In the case of Farm #3, the Will specifically directed that the capital gains taxes "attributable to this property ... shall be paid by the beneficiaries of the said property". In the case of Farm #2, the Will stated that the "capital gains tax with respect to this property" was to be paid from the residue. Thus, it seemed that taxes with respect to both Farms #1 and #2 were to be borne by the residue.

The applicants were the beneficiary of Farm #3 and the residual beneficiary. The position of the beneficiary of Farm #3 was essentially that in determining his required payment of capital gains taxes, there should be a pro-rata sharing of the capital gains deduction available to the deceased based upon the relative deemed capital gain of Farm #3 to the aggregate deemed capital gain for the three farms.

The residual beneficiary argued that the measure of taxes properly attributable to Farm #3 was to calculate the difference between the taxes payable with that property included in the calculation and the taxes that would have been payable without that property. This argument would have had the effect of allocating the available capital gains deduction to Farms #1 and #2.

It is trite to state that the obligation of the Court was to ascertain the testator's intention from the language of the Will. In this case, the

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