

COURT OF APPEAL FOR ONTARIO

CITATION: Roe v. Roe, 2024 ONCA 179

DATE: 20240311

DOCKET: COA-22-CV-0319

Tulloch C.J.O., Hourigan and Dawe JJ.A.

In the Estate of Beverly Grace Roe, deceased

BETWEEN

Robert Mark Roe

Applicant
(Appellant)

and

Randall Scott Roe and Raymond Christopher Roe, in their capacity as Estate Trustees of the Estate of Beverly Grace Roe, Deceased, and Randall Scott Roe in his capacity as Estate Trustee of the Estate of Richard Thomas Roe, Deceased, and in his personal capacity

Respondent
(Respondents)

AND

BETWEEN:

Robert Mark Roe

Plaintiff
(Appellant)

and

Raymond Christopher Roe, in his capacity as Estate Trustee of the Estate of Beverly Grace Roe, Deceased, and in his personal capacity and Randall Scott Roe in his capacity as the Estate Trustee of the Estate of Beverly Grace Roe, Deceased, the Estate Trustee of Richard Thomas Roe, Deceased, and in his personal capacity

Defendants
(Respondents)

Brendan Donovan and Noah Kochman, for the appellant Robert Mark Roe

Nikhil Mukherjee and Andrew Rogerson, for the respondent Randall Scott Roe

David N. Delagran, for the respondent Raymond Christopher Roe

Heard: February 21, 2024

On appeal from the judgment of Justice Sugunasiri of the Superior Court of Justice, dated October 14, 2022, with reasons reported at 2022 ONSC 5821.

REASONS FOR DECISION

A. INTRODUCTION

[1] Beverly Grace Roe (“Beverly”) died on July 12, 2014, at the age of 90. Her Last Will and Testament, dated August 24, 2005 (the “2005 Will”), named three of her four sons as beneficiaries – Richard Thomas Roe (“Rick”), Randall Scott Roe (“Randy”), and Raymond Christopher Roe (“Chris”). Her fourth son, Robert Mark Roe (“Mark”)¹, was excluded. The exclusion of Mark was a change from her previous wills, which provided for her assets to be split equally among her four sons.

[2] Mark applied to have the 2005 Will declared invalid on the basis that Beverly lacked testamentary capacity. In a related action, Mark sued Rick, Randy, and Chris to set aside monetary gifts that Beverly made prior to her death. However,

¹ First names are used for clarity.

Mark conceded that if he was not successful in setting aside the 2005 Will, he had no standing to challenge the gifts.

[3] The application judge dismissed the application and the action. She found that the 2005 Will was made under suspicious circumstances, but that Beverly had the requisite testamentary capacity to make it and was not operating under “insane delusions” when she disinherited Mark. She further held that Beverly was not unduly influenced by Rick when she instructed counsel on the 2005 Will and that Beverly understood the extent of her property. Mark challenges all of these findings on appeal. As we will explain, we are not persuaded by these submissions and dismiss the appeal.

B. ANALYSIS

(1) Insane Delusions

[4] Some brief background is necessary to place this issue in context. Starting in August 2001, Mark and his wife, Kathy, raised concerns of elder abuse by Rick of Beverly. They communicated with family services about their concerns and escalated the issue to the police. Beverly denied any abuse.

[5] On April 10, 2003, Kathy called Beverly’s doctor, Dr. Roy, to apprise her of the situation with Beverly, Rick, and the police. She raised the possibility of referring Beverly to Sunnybrook Hospital for counselling. The doctor made a note

to this effect and also made a note about Beverly not driving. Beverly later found out about the phone call and the notes taken by her doctor and was upset.

[6] Beverly visited her doctor on February 8, 2005, due to some memory loss she was experiencing while playing bridge. She was referred to a Dr. Roussev who, in April 2005, provided a working diagnosis of early Alzheimer's with some memory and other cognitive deficits. Dr. Roussev reported the matter to the Ministry of Transportation. In June 2005, Beverly failed her driver's test and lost her licence.

[7] In mid-August of 2005, Beverly met with a lawyer and instructed her to prepare a new will. Dr. Roy confirmed on September 9, 2005, that Beverly was competent based on her knowledge of Beverly and the fact that Beverly was only at the very early stages of the working diagnosis of Alzheimer's.

[8] On October 27, 2005, the lawyer commissioned a sworn statement from Beverly, which listed several reasons for Mark's disinheritance. These included the reporting of Rick to the police for elder abuse. Another significant factor was Kathy's call to her doctor with a "pack of lies", including that Beverly was no longer driving and should see a psychiatrist. Beverly also felt that Mark and Kathy had planned for years to contact her doctor and cause her trouble. In support of this assertion, she claimed to have found a note dated in 1998 with Mark's handwriting made out to her doctor.

[9] The application judge held that Mark had established that the 2005 Will was executed under suspicious circumstances. She applied the test from *Vout v. Hay*, [1995] 2 S.C.R. 876, and based her determination on the timeline of events leading up to the 2005 Will – namely, the proximity of the will change to Beverly’s early Alzheimer’s diagnosis, the total disinheritance of Mark who previously had a close relationship with his mother, and allegations of elder abuse against Rick. The primary issue then became whether the respondents had proven on a balance of probabilities that Beverly was not operating under insane delusions that affected her disposition of her assets.

[10] Regarding insane delusions, the application judge adopted the approach of Cullity J. in *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Ont. S.C.) that the fundamental question regarding the issue is “whether the belief should be characterized merely as being quite unreasonable, on the one hand, or as something that, in the particular circumstances, no one ‘in their senses’ could believe.” Further, she relied on the following heuristic from *Boughton v. Knight* (1873) L.R. 3 P. & D. 64 (U.K.), at 68: “Can I understand how a person in possession of their senses could have believed the fact or facts that has impacted the will-making?” The application judge answered that question in the affirmative and found that Beverly was not suffering from insane delusions.

[11] On appeal, Mark submits that the trial judge erred because she applied an incorrect test based on the erroneous view that a false belief with some basis in

fact cannot be an insane delusion. According to Mark, in considering the issue of an insane delusion, a court should review all of the circumstances and inquire whether a person capable of remembering and making rational judgments could hold the belief in question.

[12] We do not agree with Mark's submission that the application judge restricted her analysis to "a search for some kernel of truth in an otherwise false belief." To the contrary, she engaged in a detailed review of the circumstances, which she found provided a factual basis to explain the disinheritance. These circumstances included Mark and Kathy's allegation of elder abuse and reporting of Rick to the police, as well as Kathy telling Beverly's doctor that she did not drive and suggesting that she be referred for counselling.

[13] The application judge also found that there is a tendency in the Roe family for members to "hold onto beliefs that can be countered by more reasonable and objective facts" and that the "Roes appear to be a passionate family who think and feel deeply about the issues that affect them." This family dynamic helped explain why Beverly believed that Mark and Kathy had been planning for several years to contact her doctor and cause trouble.

[14] While the application judge found that Beverly acted irrationally and hyperbolically at times, she held that there was a factual foundation to ground her views. We see no error in this analysis and no basis for appellate interference.

(2) Undue Influence

[15] Rick lived with his mother for virtually his entire life, until she died. Mark, Chris, and to a lesser extent Randy, agreed that Rick could be a difficult person and could be intimidating and controlling of the family. It is also not disputed that Rick drove Beverly to the lawyer to prepare the 2005 Will.

[16] Mark submitted that Beverly was unduly influenced by Rick to change her will. The application judge rejected that submission. She held that Beverly was able to manage her relationship with Rick, despite his alleged difficult personality. On appeal, Mark asserts that the application judge erred in her undue influence analysis by ignoring relevant factors in the jurisprudence on undue influence and by conflating allegations of elder abuse with undue influence. We are not persuaded by this submission.

[17] Mark cites *Tate v. Guegueirre*, 2015 ONSC 844 (Div. Ct.) as an example of the factors that should be considered in an undue influence analysis. There, the court helpfully provided a list of points it considered in its undue influence analysis, including the testator's isolation, the failure to explain why certain family members were not named as beneficiaries, the existence of *inter vivos* gifts, the circumstances surrounding the creation and execution of the impugned will, and statements made by the deceased that he feared the respondent.

[18] Contrary to Mark's submission, there is no set list of considerations that must be considered in all cases when considering an allegation of undue influence. Instead, the analysis of the issue is case specific and should examine the circumstances to understand the nature of the relationship between the alleged influencer and the deceased.

[19] In the case at bar, the application judge focused on the evidence of Mark's expert on elder abuse to determine whether Rick unduly influenced Beverly to disinherit Mark. There was nothing impermissible in the application judge relying on this evidence to understand the nature of the relationship between Rick and his mother. She concluded that that the facts did not support the inference that Beverly was susceptible to Rick's influence and that Beverly was not particularly vulnerable to him. The application judge also found that "Beverly and Rick had a symbiotic relationship that seemed to work" and that she was able to manage Rick. We see no error in that analysis, which was well rooted in the evidence.

(3) Understanding of Assets

[20] Finally, there is the issue of Beverly's understanding of her assets. The application judge found that Beverly had sufficient knowledge of her assets to instruct counsel. In so finding, she relied on the evidence of the geriatric psychiatrists called by both sides that Beverly understood her assets at the time of instructing the lawyer. She also noted that Beverly brought to the lawyer's office a

list of assets. Mark submits that the application judge erred in abdicating her function as the trier of fact in allowing the geriatric psychiatrists to decide what Beverly knew.

[21] We do not accept this argument. The application judge was entitled to rely on the evidence of the geriatric psychiatrists and conclude that Beverly understood the nature and extent of her property. A competent testator does not have to know the precise make up of her estate, only in a general way the nature and extent of her property: *Orfus Estate v. The Samuel and Bessie Orfus Family Foundation*, 2013 ONCA 225, 304 O.A.C. 349, at para. 60. There is no basis for appellate interference with this finding.

C. DISPOSITION

[22] The appeal is dismissed. Randy is entitled to his costs of the appeal on a partial indemnity basis payable by Mark, fixed in the all-inclusive amount of \$35,000.

[23] Mark sought leave to appeal the costs award below and Randy also brought a cross-motion for leave to appeal that order. If the parties intend to proceed with the motion or the cross-motion, they must serve and file their materials in support of their motions for leave to appeal by March 18, 2024. The responding materials must be served and filed by March 25, 2024. Any reply materials must be served

and filed by March 29, 2024. All materials must be copied to the Executive Legal Officer.

“M. Tulloch C.J.O.”

“C.W. Hourigan J.A.”

“J. Dawe J.A.”