Cour supérieure

CANADA
PROVINCE DE QUÉBEC
DISTRICT de Montréal

NO: 500-05-065761-015
DATE: 15 juillet 2004
DATE D'AUDITION: 7 juin 2004
EN PRÉSENCE DE: PEPITA G. CAPRIOLO, J.C.S.

Glen Goodale
Plaintiff
v.
Brenda Marion Sharples McCall
Defendant

Pepita G. Capriolo, J.S.C. :–

1 Margaret Egan died in April 2001, aged almost 87.

2 Her notarized will, dated April 9 1999, left the bulk of her estate to five heirs: Brenda McCall, her son Brian McCall, her brother Peter Sharples, as well as to two friends Glen Goodale and Gerald Alie. Alie having predeceased her, the estate was to be distributed into four equal shares among the remaining heirs.

3 Brenda McCall was appointed liquidator.

4 At the time of Margaret Egan's death her estate amounted to less than $10,000, including life insurance, R.R.Q. survivor payment and expected income tax reimbursements.

5 In November 1999, Margaret Egan held a portfolio with Royal Trust of over $ 320,000.

6 Goodale claims that McCall had depleted Margaret Egan's estate prior to her death; McCall's position is that Margaret Egan decided to donate approximately $ 315,000 to her in exchange for her promise to take care of her and visit her often for the rest of her life.

The facts

7 Margaret Egan was an independent woman who had lived with her sister for most of her life. Neither had any children. As a result, they made very strong links with some long time friends and, eventually, with their friends children who became part of their extended family. Both Goodale and McCall belonged to this category of *quasi* nephews.

8 McCall was married in the United States and moved there in the 1970's. She maintained a close relationship with Margaret Egan despite the distance. They visited one another and kept in touch by phone. By the 1990's and especially after Dorothy Egan's death, McCall would drive up to Montreal from her home in New Hampshire two to three times a year.

9 In March 1998, McCall suffered a cerebral aneurysm and had to have surgery. She and her husband were both out of work during a difficult period of a few months. Fortunately, she recovered and resumed her visits to Montreal in the fall of 1998. At this time, Margaret Egan mentioned that she might want to

move to a more suitable apartment, possibly a senior citizen residence. McCall returned to Montreal several times over the next few months in order to help her make her choice. Margaret Egan eventually decided on the Manoir Kirkland where she moved at the end of June 1999.

10 In the mean time, Margaret Egan discussed her financial arrangements with McCall. All her assets were held by the Royal Trust which deposited $1,000 monthly into her account, retained an annual fee of $ 4,000 and reinvested the remaining income. The Royal Trust was also named liquidator in Margaret Egan's will at the time. In order supposedly to distance herself from an over-involvement with the Royal Trust, Margaret Egan signed a new will in April 1999, appointing instead McCall as liquidator. She also gave McCall a notarized Power of Attorney over her affairs. At the same time, she decided to ask McCall to take over the task of filling her income tax returns, which had previously been done by Goodale.

11 In August 1999, McCall, armed with Egan's Power of Attorney, contacted the Royal Trust with the purpose of closing Egan's account and transferring all of Egan's assets into an account in her own name. The alleged purpose of this transfer was a better management of the portfolio in order to increase its capital value. McCall admitted in court having no particular expertise in financial matters. The Royal Trust refused to follow these instructions on the basis of McCall's Power of Attorney and contacted Egan who cancelled the request for the transfer.

12 On October 8, 1999, McCall again contacted the Royal Trust :

> “I will be in Montreal on October 15. Please begin the process of opening an account in my name so that we can begin to transfer all of Margaret Egan's assets (except the stocks) into my name into my new account. My understanding is that there is no gift limit or penalty for her to transfer this money.”

13 Carmela Guerriero of the Royal Trust answered McCall's e-mail thus:

> “I will be more than happy to meet with you and Miss Egan on Friday October 15, 1999. Please confirm the time and if you'd like to meet in Beaconsfield so that I can confirm and schedule a conference room there. Ms McCall, I will wait to open up the account in your name. There are certain factors that I'd like to go over with you and Miss Egan prior to opening an account.”

14 McCall replies:

> *“(…) I do not see why Miss Egan needs to be present. I will have a copy of her Power of Attorney and you have received her letter and spoken to her on the phone. The main reason to do this transfer is that she has given her trust to me to handle these affairs. She will not be attending the meeting.”*

15 When asked in court why she did not think it necessary for Egan to be present at a meeting where she was supposed to hand over the bulk of her assets, McCall answered that it was too difficult to drive her into downtown Montreal even though Guerriero had offered to meet them in the West Island. As for the reasons for the transfer, McCall repeated that it was only to manage more efficiently Egan's money and to increase her capital by means of better investments. Her concern was that Egan might need costly nursing care in the future and that her present assets were not sufficient to provide such care. She could not explain why, when she already held a Power of Attorney, she needed to have the money transferred into an account in her own name just to manage the account.

16 In her contemporary notes of the events, Guerriero writes:

> Oct. 12. 1999
> *Mrs McCall was bothered by that and wanted to meet with me without Miss Egan present. I explained to Mrs McCall that Miss Egan was our client and that I was not going to execute her instructions*

without Miss Egan's approval. I spoke with Mrs McCall on October 13, 1999 to again reiterate that transferring the assets was not a good solution for Miss Egan. I especially indicated that if Mrs McCall were to have these assets in her name… then Miss Egan would lose total control and ownership of her funds. Miss Egan would need this money even more so in the future seeing that she is getting older and her health care costs could rise. Mrs McCall said that she would provide for Miss Egan. I also reiterated the fact that these assets would then become part of Mrs McCall's estate (should she pass away tomorrow). Then Mrs McCall replied that her 21 year old son was her liquidator and that he would continue to provide for Miss Egan during Mrs McCall absence. In addition… Mrs McCall said to me that she was receiving the bulk of Miss Egan's estate and that she is looking for ways to receive part of it now. (THIS IS HER OBVIOUS OBJECTIVE OF HAVING MISS EGAN TRANFER THE ASSETS TO HER.)

17 The meeting did take place on October 15, 1999 in the presence of Miss Egan who insisted on closing her account with the Royal Trust despite Guerriero's warnings. In her notes, the latter wrote:

I asked her if she was satisfied with her account with us and asked her if she was receiving enough income and she said yes. Yet she later said that she wanted Mrs McCall to look after everything and asked to close the account.

18 Egan confirmed the closure of the account in a handwritten letter dated October 18, 1999 instructing the Royal Trust to sell all fixed income securities and deposit all cash into "*my bank account # ...".* Her BCE shares were to be registered in her name and the dividends mailed quarterly to her home address.

19 An amount of $ 280,000 was transferred into account no. 504 661 on November 1, 1999. The statement relating to that deposit only has Egan's name on it, as did all previous statements since the account was opened on May 31, 1999. McCall claims that the account was opened as a joint account. Despite several subpoenas *duces tecum*, the Royal Bank failed to produce the opening account forms and the Court has only McCall's word for this.

20 The following bank statement, dated December 8, is made out jointly to Egan and McCall and contains a second deposit from Royal Trust in the amount of $ 9,181.75 on November 9 and a withdrawal of $286,964 on November 12. Both parties admit that at the time of this withdrawal the account was joint.

21 The withdrawn amount was transferred on the same date into a joint account held by McCall and her husband John McCall. McCall testified that she had opened this account with her husband in order to have easy access to Canadian funds when visiting Egan. The account had been opened on May 31, the same day as Egan's account, but had been left inactive since that time.

22 On November 12, 1999, McCall transferred $ 283,180.60 out of this joint account into an American account.

23 McCall explained that suddenly, during her visit in November, despite the instructions given to the Royal Trust and the alleged desire to have her money managed for her, Egan decided to donate the entirety of her assets to McCall so that the latter could "*arrange her life in a way to make it easier for her to come and visit Egan as often as needed."*

24 In exchange for this alleged gift, McCall did not sign any document, modify her will, set up a trust or in any way provide for the security of Egan's well-being in case McCall could not take care of her herself.

25 On April 7, 2000, Egan authorized the deposit of her BCE shares into an American TD Waterhouse joint tenants with rights of survivorship account in which McCall was named as principal account holder. On May 29, she did the same for her Nortel shares.

26 On June 27, 2000, the Royal Trust made one final deposit into account no. 504661 in the amount of $28,666.82. A few days later, McCall transferred $ 25,000 out of this account into her and her husband's joint account and a week later sent $ 20,000 to her American account.

27 As of July 4, 2000, Egan had been despoiled of all her assets.

Analysis and the Law

28 The Court must decide whether Egan had in fact donated the contents of her investment portfolio to Brenda McCall prior to her death and, if so, whether this donation is valid under Quebec law.

29 Article 1824 C.C.Q. sets out the rules governing gifts *inter vivos*:

> *The gift of movable or immovable property is made, on pain of absolute nullity, by notarial act en minute, and shall be published.*
>
> *These rules do not apply where, in the case of movable property, the consent of the parties is accompanied by delivery and immediate possession of the property.*

30 McCall claims that she has received Egan's portfolio as a *don manuel* and that, therefore, the lack of notarial act is not a cause of nullity.

31 In this case, the proof of the *don manuel* is based on the presumption of ownership founded on McCall's possession of the money and the shares. This presumption, however, can be rebutted.

32 First, the Court does not believe McCall's testimony claiming that Egan intended to donate the entirety of her portfolio to her. She contradicted herself when she testified that Egan unexpectedly decided to donate her portfolio to her in November 1999. On October 8, McCall was already planning a *gift* when she wrote to the Royal Trust: "*my understanding is that there is no gift limit or penalty for her to transfer this money."* How could she have known of this gift intention then? She insisted on proceeding with this total transfer of funds on the basis of her Power of Attorney in the absence of Egan. Only after the persistent request of Guerriero, did McCall agree to bring Egan to the meeting. At this meeting, Egan agreed to the closure of her Royal Trust account and to the transfer of the assets in HER own account. No mention was made then or in Egan's subsequent letter of a transfer into McCall's account.

33 In her examination out of court of July 5, 2001, McCall was not sure that she had indeed received the money as an outright gift:

> *A: She wanted me to be able to adjust my life in such a way that I could not have to worry about working, I could invest it.*
>
> *Q: For whom?*
>
> *A: I was investing it for her and myself.*

34 Ms Dorothea Bolton, a friend of Egan's, testified that Egan had told her that she had transferred her money to McCall "*to look after her affairs."*

35 McCall's purported reason to have the assets transferred out of the Royal Trust initially is also in direct contradiction with her later behaviour. McCall testified that she planned to administer the assets so as to increase the capital in order to provide for future problems that might beset Egan. Yet, she left Egan without ANY capital and no guarantee in case of her own failing health.

36 Finally, it is extremely indicative of Egan's true intention that she decided not to change her will. According to Dorothea Bolton, Egan was extremely fond of Peter Sharples and it is difficult to believe that she had planned to disinherit him for all intents and purposes.

37 In conclusion, the presumption of a *don manuel* has been rebutted because of the lack of consent by the donor and by the equivocal nature of the possession by the donee.

38 In addition, even if the presumption of *don manuel* had not been rebutted, such a gift would be invalid under Quebec law as it consists of the entirety of Margaret Egan's assets.

39 Since the key judgment on this subject, *Forest c. Parent*[1] , it has been held that a *don manuel* cannot consist of the totality of the presumed donor's assets:

> *"Considérant que lors de la prétendue donation, la presque totalité des biens de la demanderesse ne pouvait, en droit être l'objet d'un don manuel."*[2]

40 This principle has been reiterated recently by the Court of Appeal:

> «CONSIDÉRANT, en l'occurrence, qu'il ne peut s'agir d'une donation puisque d'une part le don manuel, selon l'article 771 du Code civil du Bas-Canada, ne peut couvrir la totalité de l'actif du donateur non plus qu'une universalité des biens, que d'autre part, si la donation n'était pas un don manuel, elle devait selon les dispositions du Code civil du Bas-Canada être notariée et enfin qu'une donation ne se présume jamais.»[3]

41 In this instance, Egan was left with her pension and some monthly groceries and spare change given to her by McCall at her discretion instead of a steady additional annual income of $ 12,000 and a capital of $ 320,000. This is exactly the kind of situation the law was meant to prevent. Therefore, even if Egan had meant to donate the entirety of her portfolio to McCall, such a donation would be null and void.

42 Goodale is one of the four surviving universal legatees under Margaret Egan's will. He has chosen however to act on his own behalf only and not in the name of the succession of Margaret Egan and has amended his proceedings to claim only a quarter share of the moneys McCall has admitted having received from Egan, that is a quarter of $ 311,964. Since the alleged donation is null and void, the Court condemns McCall to pay Goodale $ 77,991 with legal interest from the date of the institution of the present proceedings.

43 He has also asked the Court to decide the validity of the seizure before judgment taken against the Defendant. Given the conclusions reached above, the Court declares the seizure valid.

FOR THESE REASONS, the Court

GRANTS Plaintiff's action;

DECLARES the alleged gift to Defendant Brenda Marion Sharples Mc Call null and void;

CONDEMNS Defendant to pay to Plaintiff the sum of $ 77,991 with legal interest from the date of institution of the present proceedings;

DECLARES valid the seizure before judgment taken against Defendant .

THE WHOLE, with costs.

Pepita G. Capriolo, J.S.C.

1. Forest c. Parent,(1949) R.L. 1

2. Supra. note 1,p.10

3. Évrard c. Lefrançois, [2001] CA p.3

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