Ontario Court of Appeal struggles with testatrix's intentions for sale of family farm

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Research Pod

Case(s):

Janicek v. Janicek, 2018 ONCA 679
Janicek v. Janicek, 2018 ONSC 681

In a 2-1 decision, the Ontario Court of Appeal has dismissed the appeal of a brother against trustees of a parent's estate in a clash over the family farm. Counsel said the decision highlights the importance of will drafting.

In *Janicek v. Janicek* 2018 ONCA 679, the court heard that the respondents, Steven Janicek Jr. and Franklin Janicek, and the appellant, John Janicek, are brothers. Their dispute involves directions their mother, Anne Emily Janicek, left in her will on how the family farm should be sold.

Steven and Franklin are the trustees of their mother's estate. According to court documents, they brought an application for advice on the construction of the will in relation to the farm. The will directs that the trustees should have the farm appraised for its fair market value as of the date of their mother's death.

Gemma Charlton, Cohen Highley LLP Lawyers

According to court documents, the will goes on to say that it was the testatrix's wish that the farm be kept in the Janicek family. It states: "In accordance with that wish if any of my children, or a combination of the same, shall wish to purchase the said farm, they may do so at 75 per cent of the appraised fair market value provided that they enter into an Agreement of Purchase and Sale with my Trustee within one year from my date of death with a closing date no longer than 60 days from the date of the Agreement of Purchase and Sale. In the event that none of my children, or combination of same, have agreed to purchase the said farm, within the prescribed time, the same shall be sold by my Trustee at a price to be determined by my Trustee in his sole and unfettered discretion."

The will also noted that proceeds of the sale are to be distributed to the testatrix's five children.

By the first anniversary of the testatrix's death, Steven and Franklin had four competing offers for the farm: the appellant, John Janicek; Andrew Janicek; and both trustees. According to court documents, Steven, Franklin and Andrew were willing to offer the purchase the farm in combination with John, but the appellant wanted to buy the farm on his own.

This led to each of the four children submitting individual offers. The court noted that the appellant is "the only one of the children who farms full time for a living."

Since the trustees were uncertain about which offer should be accepted, they did not complete an Agreement of Purchase and Sale with any of the children within one year of their mother's death. Instead, they brought an application for advice regarding "the sale of the farm and for an order for vacant possession of the portion of the farm previously leased to the appellant."

The application judge, Justice Jonathon George of the Superior Court of Justice, determined that the testatrix's intention on what should happen if there were competing offers from her children "could not be ascertained." According to court documents, Justice George ordered that trustees could sell the farm "to whomever they choose and at a price they determine, in their sole and unfettered discretion".

This led the appellant to appeal, advancing three arguments. First, he argued that Justice George erred in finding that the appellant, the trustees, and their brother Andrew had not concluded an agreement to purchase the farm together in the form of an "Memorandum of Understanding" (MOU) signed after the proceedings were commenced in an effort to settle their differences and that the judge did not give effect to the MOU.

Second, he argued that if the parties "did not conclude a binding agreement to purchase the farm together after the proceedings were commenced, it was because the trustees acted unreasonably." And third, that Justice George erred in making his order "because the trustees frustrated the sale of the farm to him."

According to court documents, the appellant argued that the trustees acted "improperly" by consulting the other children to see if they wanted to make offers, after the appellant had made the first offer to be received by the trustees.

Justice Alexandra Hoy, for the Court of Appeal, wrote that while she is not in agreement with all of Justice George's reasons, she does agree with him that "properly construed, the will does not require the trustees to sell the farm to the appellant, in the event that the children make competing offers within the prescribed period. Further, at the hearing of the appeal, the appellant conceded this."

In addressing the arguments on appeal, Justice Hoy noted that it's not clear that the appellant sought an order before Justice George requiring the farm's sale in accordance with the MOU.

"In any event, the application judge essentially found that the MOU was an 'agreement to agree' and that parties were unable to negotiate the remaining details of the MOU because the appellant reverted to his original position that he alone should be able to purchase and own the farm," she wrote, adding that this finding is supported by the record and "there is no basis to interfere with it."

Justice Hoy noted that the record does not support the appellant's second argument and that "the conduct of the appellant, and not that of the trustees, was the reason an agreement was not concluded."

She was also not persuaded by the appellant's third argument and noted that the will "expressly contemplates that a combination of children may purchase the farm and does not give preference to the appellant."

"It was reasonable and appropriate for the trustees to consult with the other children and not simply invite the appellant to submit an offer that complied with the will and conclude an agreement of purchase and sale with him," she added.

Consequently, Justice Hoy, with Justice Gladys Pardu in agreement, determined in a decision released Aug. 3 to dismiss the appeal and ordered that the trustees are entitled to costs.

Justice Katherine van Rensburg dissented as she disagreed with Justice Hoy's conclusion on the principal issue: "whether the application judge erred in his treatment of the apparent competing offers for the farm by failing to give effect to the appellant's arguments that his attempt to purchase the farm had been frustrated by the actions of the estate trustees."

Justice van Rensburg wrote that Justice George's failure to address these arguments was relevant to whether there were "competing offers" for the trustees to consider. She noted that the issue being identified as "determining the testatrix's intention if there were competing offers within a year of her death" led to Justice George's second error.

"After referring to the principles for interpretation of wills, including the 'armchair rule' (where the court considers indirect evidence relating to the surrounding circumstances at the time of execution of the will), the application judge did not go on to apply the rule. Instead he concluded, at para. 30, that there was no extrinsic evidence of the testatrix's intention," she wrote, adding that there was evidence put forward by the parties in this regard.

It was important, Justice van Rensburg stressed, for Justice George to "use the means at his disposal," which included the evidence of "surrounding circumstances," to try to give meaning to the will before allowing the trustees to proceed with a sale in their discretion.

"This is especially the case given the wish of the testatrix for the farm to remain in the family," she noted, concluding that the appeal should be allowed.

Gemma Charlton, an associate at Cohen Highley LLP Lawyers and counsel for the respondents, said this decision highlights the importance of will drafting.

"The other takeaway that is of importance is where Justice Hoy points out the balance between the wording of a will, or the wording of a decision, and the need to balance that with a trustee's over all fiduciary duties," she said, drawing attention to paragraph nine of the decision.

Justice Hoy, she said, noted that there was still some potential for further interpretation once a determination had been made by Justice George.

"That was addressed at the appeal by acknowledging the need to balance that with the overarching fiduciary duties of trustees," she added.

Charles Ticker, Charles B. Ticker Law Office

Charles Ticker, of Charles B. Ticker Law Office, specializes in estate litigation and has experience in drafting wills. He said cases involving the division of a family farm or cottage are common and that it's challenging to foresee what issues might arise after a will has been drafted.

Ticker suggested lawyers advise their clients to sit down with their families to discuss what should happen after they die.

"In that discussion you could come to a resolution at that time. Or give the parent a little more insight, so when they draft their will they can give instruction. They'll have a better idea of what's going on and of what's in their children's minds. Here, a parent was trying to do the right thing, wants to keep the farm in the family, but maybe did not have a true sense to the competing interests for that farm," he said.

"The fact that this was a split decision, there was a very strong dissent, underscores the difficulty in drafting for these contingencies. You couldn't even get three Court of Appeal judges to agree on how to deal with this," he added.

Counsel for the appellant did not respond to a request for comment.

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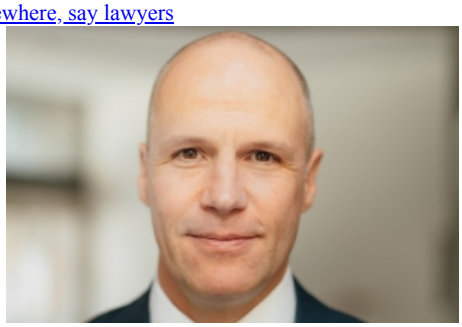
Tax  Feds to change law on political activities by charities, appeal case ordering them to do the same

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