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Mugford v. Mugford (Nfld. C.A.)

Between
Ernest Mugford, Appellant, and
Gordon Mugford, Respondent

[1992] N.J. No. 349
1991 No. 164

Newfoundland Supreme Court - Court of Appeal
Goodridge C.J.N., O'Neill and Cameron JJ.A.

Heard: November 9, 1992
Judgment: December 15, 1992
(22 pp.)

David Hurley, for the Appellant.
William Morrow, for the Respondent.

Reasons for judgment by: Goodridge C.J.N. Concurred in by: O'Neill and Cameron JJ.A.

GOODRIDGE C.J.N. (allowing the appeal): — The principal issue on this appeal is what interest, if any, the next of kin of a person who dies intestate have in land belonging to the estate of that person. Other issues were presented to the Court but, as it will be held that the next of kin have no interest in such land, it will be unnecessary to resolve the other issues.

The Facts

Thomas Mugford died on August 19, 1952. It is being assumed for the purpose of this decision that he was at the time of his death the owner of the land at Clarke's Beach, Newfoundland in respect of which this action was brought.

That land consists of three lots. The first lies on the west side of the old railway right-of-way which ran through Clarke's Beach. It may be described as the homestead. The second lies opposite the first on the east side of the railway right-of-way and may be described as the vegetable garden. The third is contiguous to the second and is known as the pond property which extends easterly from the vegetable garden to Clarke's Beach Pond.

Thomas Mugford had two wives, both of whom pre-deceased him. By his first wife, he had three sons, namely,

John Thomas Mugford,
William Mugford, and
Cyrus Mugford

and by the second wife he had four sons, namely,

Joseph Mugford,
Warren Mugford,
Harry Mugford, and
Robert Mugford.

Robert Mugford had always lived on the homestead and remained there after his father's death until his own death in 1976. Upon the invitation of his father, Joseph Mugford and his wife, Olive, took up residence on the homestead in 1942 and remained there until Joseph died in 1989.

Joseph Mugford was regarded by some members of the community as the owner of the Thomas Mugford property although there was evidence that others, including John Thomas Mugford, had used the vegetable garden for growing potatoes periodically over the years after Thomas Mugford died.

Gordon Mugford who brought this action is the son of John Thomas Mugford. On May 26, 1986 John Thomas Mugford conveyed to Gordon Mugford all his interest in the land granted to George Mugford who was Thomas Mugford's grandfather. A portion of the land so granted forms part of the land which is now being assumed to have belonged to Thomas Mugford. It by no means embodies all of such land.

This action was commenced in August, 1990. John Thomas Mugford died on March 31, 1991 and letters of administration of his estate were granted to his widow, Lucy Mugford. Lucy Mugford as administrator of the estate of John Thomas Mugford conveyed the interest of the John Thomas Mugford estate in the disputed land to Gordon Mugford on May 10, 1991, after the action was commenced.

Gordon Mugford by virtue of these deeds acquired whatever interest his father, John Thomas Mugford, had in the disputed land.

On June 9, 1988 Joseph Mugford and Olive Mugford purported to convey all of the disputed land to Ernest Mugford, the appellant and his sister, Donna Mugford Brisson. On February 27, 1990 Donna Mugford Brisson conveyed the interest acquired by her under that deed to the appellant. Ernest Mugford by virtue of these deeds acquired whatever interest his father, Joseph Mugford, his mother Olive Mugford, and his sister, Donna Brisson, had in the disputed land.

There was no evidence before the trial court that an administrator of the estate of Thomas Mugford had ever been appointed. Certainly no such administrator was a party to this action. All of the sons of Thomas Mugford are now dead and none of their estates, nor any person claiming through or under them except Gordon Mugford and Ernest Mugford, is a party to this action.

In this action Gordon Mugford claims against Ernest Mugford a declaratory judgment that

(a) he and Ernest Mugford are heirs of Thomas Mugford, and "issue" of the said Thomas Mugford pursuant to s. 2(b) of the Intestate Succession Act;

(b) by virtue of the deed of May 26, 1986 he "enjoys" his father's interest in the property described therein;

(c) he "enjoys" legal interests in both lot no. 1 and lot no. 2; and

(d) Ernest Mugford is not the sole owner in fee simple of lot no. 1 and lot no. 2.

There were attached to the statement of claim Schedules A and B, each of which has on them

plans of two lots which were described in each schedule as lot 1 and lot 2. It is evident that when the respondent, in his statement of claim, refers to lot 1 he is referring to lot 1 on Schedule A which is the homestead and when he refers to lot 2 he is referring to lots 1 and 2 on Schedule B which are the vegetable garden and the pond property respectively.

The appellant defended the action on the basis that his father Joseph Mugford, through whom he claims, had been in open, exclusive, notorious and continuous possession of the disputed land for more than 20 years and pleaded the Limitation of Actions (Realty) Act which now appears in the Revised Statutes of Newfoundland, 1990 as Chapter L-16.

The trial of the action was concerned almost entirely with whether or not Joseph Mugford had enjoyed such possession for that many years. Much of the evidence, while it may have been clear to the trial judge, is confusing to the Court of Appeal because many of the witnesses spoke of land use by various persons without specifying in a manner which can be understood from a reading of the transcript what land is being talked about. This is a difficulty which frequently occurs when a land dispute case is appealed.

Although there were surveyor's plans of the properties, there was no surveyor's description of them; nor was there any evidence by a surveyor describing the land use.

One gets the impression that Joseph, Olive and Robert Mugford were in possession of the homestead, that there was intermittent use by other members of the family of the vegetable garden and that the pond property which was also known as the caplin pit was seldom used.

The Trial Judge

The trial judge held that Joseph Mugford and Robert Mugford had open, exclusive, notorious and continuous possession of the homestead and that potential claims by other members of the family were ousted by the time of Robert Mugford's death in 1976. There was no mention of what interest, if any, Olive Mugford, who was Joseph's wife and Ernest's mother, had in the land.

The trial judge further held that, with respect to what he described as the back land which was presumably the vegetable garden and the pond property, neither Joseph Mugford nor Robert Mugford enjoyed exclusive possession and that, when Robert Mugford died intestate, his interest devolved upon his six surviving brothers in equal shares to the extent that each had a one-sixth interest in that property.

It is difficult to reconcile his findings in this respect with his ultimate declaration. In his decision, the trial judge declared that

(a) Gordon Mugford and Ernest Mugford are heirs of Thomas Mugford and "issue" of Thomas Mugford pursuant to s. 2(b) of the Intestate Succession Act;

(b) By virtue of the various conveyances above mentioned, Gordon Mugford enjoys the interest of his father, John Thomas Mugford, in the property therein described; and

(c) Gordon Mugford enjoys an interest in both lots no. 1 and no. 2.

Inasmuch as the interest, if any, of Gordon Mugford in most of the disputed land was not acquired until after the action was commenced, there is a question as to whether any of the relief claimed in the statement of claim could be granted. He would have no cause of action in respect of land in which he held no interest at the time the action was commenced.

The reference to lot no. 1 and lot no. 2 by the trial judge in his declaration seems to cover all

of the disputed land. This is inconsistent with his finding that Joseph Mugford and Robert Mugford had acquired a defence under the Limitation of Actions (Realty) Act to any claims against the homestead by other members of the family by virtue of being in open, exclusive, notorious and continuous possession for more than 20 years.

He seems to have assumed that, upon the death of Robert, Robert's interest in the land in dispute would have passed to his next of kin rather than to Joseph Mugford and Olive Mugford with whom he shared possession. There is a question as to whether the possession of Joseph Mugford, Olive Mugford and Robert Mugford was in the nature of a joint tenancy or a tenancy in common. If they were joint tenants, the interest of Robert Mugford upon his death would have passed to Joseph Mugford and Olive Mugford. If they were tenants in common, the interest of Robert Mugford on his death would have passed to his estate in which all of his next of kin would have had an interest.

The Appeal

Eight issues were identified by the appellant in his appeal. It is not proposed to deal with them as the case will be resolved solely on the question of whether or not Gordon Mugford had any interest in the disputed land and, hence, a standing to bring this action. However, brief reference might be made to several points.

The respondent sought a declaration that he was an heir of Thomas Mugford. The term "heir" does not now have any particular legal significance. An heir is described in Osborn's Concise Law Dictionary, 6th edition, 1976 as a person who succeeds by right of blood to the real property of an ancestor or on intestacy. Under modern law, as will be set out subsequently in greater detail, the property of a deceased person no longer passes to an heir but rather to the personal representative of the deceased person. The personal representative is bound by law to distribute the real and personal property of the estate of the deceased in accordance with the will or, in the case of intestacy, in accordance with the Intestate Succession Act.

The term "issue" was used by the trial judge in his decision. This term is defined in the Intestate Succession Act to mean all lineal descendants of a person through all generations. Being one of the issue of a deceased person does not of itself involve an entitlement to a share of the estate of that person.

The question was not so much whether John Thomas Mugford through whom Gordon Mugford claimed was an heir or one of the issue of Thomas Mugford but rather whether John Thomas Mugford was one of the next of kin of Thomas Mugford, an intestate, and thereby entitled to a share of his estate. The answer to that would probably be in the affirmative but that would still leave open the question of whether John Thomas Mugford had an interest in land of the estate.

The other issues raised by the appellant deal with the evidentiary question as to whether Joseph Mugford had acquired a possessory title or a statutory defence to the disputed land or a statutory defence to a claim for possession thereof by virtue of having open, exclusive, notorious and continuous possession of it for more than 20 years. That issue, in our view was not properly before the trial court for reasons that will become apparent and no opinion is offered in respect thereof.

The Law

Section 2 of the Chattels Real Act, R.S.N. 1990 Chapter C-11 provides:

> 2. All lands, tenements and other hereditaments in the province, which by the common law are regarded as real estate, shall in all courts in the province, be held to be "chattels real", and shall go to the executor or administrator of a person dying seized or possessed of them as other personal estate now passes to the personal representatives, a law, usage or custom to the contrary notwithstanding.

That statute, which is still in force, was in force at the time of Thomas Mugford's death. Sections 2(1), 4(2) and 5 of the Intestate Succession Act, R.S.N. 1990 Chapter I-21 provide:

> 2.(1) In this Act
>
> (a) "estate" includes both chattels real and personal property; and
>
> (b) "issue" means all lineal descendants of a person through all generations.
>
> 4.(2) Where an intestate dies leaving a spouse and children, 1/3 of the estate shall go to the spouse.
>
> 5. Where an intestate dies leaving issue, the estate of the intestate shall be distributed, subject to the rights of the spouse, per stirpes among the issue.

Corresponding legislation was in force at the time of the death of Thomas Mugford.

It will be seen from these provisions that the property of Thomas Mugford, real or personal, would pass to his personal representative and not to his next-of-kin. The interest of the next of kin is not in the property of an estate but in the estate itself. Although there is an implication from the definition of estate in the Intestate Succession Act that the estate of a deceased person may be distributed in whole or in part in specie, this will seldom if ever be practical. The better course of action, and possibly the only proper course in the absence of an agreement to the contrary among the widow, if any, and all of the next of kin, is for the personal representative to liquidate the estate and distribute the proceeds.

It has often been said that the next-of-kin have a beneficial interest in land of the estate of a deceased person.

In McCaughey's case, 46 S.R., N.S.W. 192, 204 Jordan, C.J. said:

> The idea that beneficiaries in an unadministered or partially unadministered estate have no beneficial interest in the items which go to make up the estate is repugnant to elementary and fundamental "principles of equity".

In Cooper v. Cooper (1874) L.R. 7 H.L. 53 at page 65 Lord Cairns, L.C. said:

> ... As regards substantial proprietorship the right of the next of kin remains clear to every item of the personal estate of the intestate subject only to those paramount claims of creditors.

In Laing and Chard v. Jackson (1978), 20 Nfld. & P.E.I.R. 352, a case not unlike this one, the issues were resolved on the basis of beneficial interests of next-of-kin in land of the estate of a deceased person.

Of the statement made by Jordan, C.J. in McCaughey's case, Viscount Radcliffe in Commissioner of Stamp Duties (Queensland) v. Livingston, [1965] A.C. 694 (H.L.) said at page 713:

> If "by beneficial interest in the items" it is intended to suggest that such beneficiaries have any property right at all in any of those items, the proposition cannot be accepted as either elementary or fundamental. It is, as has been shown, contrary to the principles of equity. But, on the other hand, if the meaning is only that such beneficiaries are not without legal remedy during the course of administration to secure that the assets are properly dealt with and the rights that they hope will accrue to them in the future are safeguarded, the proposition is no doubt correct. They can be said, therefore, to have an interest in respect of the assets, or even a beneficial interest in the assets, so long as it is understood in what sense the word "interest" is used in such a context.

Referring to the decision of Lord Herschell in Lord Sudeley and others v. The Attorney General, [1897] A.C. 11, Viscount Radcliffe said in Livingston at page 712:

> A second line of criticism has occasionally been expressed to the effect that it is incredible that Lord Herschell should have intended by his proposition to deny to a residuary legatee all beneficial interest in the assets of an unadministered estate. Where, it is asked, is the beneficial interest in those assets during the period of administration? It is not, ex hypothesi, in the executor: where else can it be but in the residuary legatee? This dilemma is founded on a fallacy, for it assumes mistakenly that for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable. There is no need to make this assumption. When the whole right of property is in a person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property, any more than there is for the property of a full beneficial owner. What matters is that the court will control the executor in the use of his rights over assets that come to him in that capacity; but it will do it by the enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets. Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines.

If the term "beneficial interest" is intended to embody a property right in the nature of an equitable interest, these statements of the law in Livingston and Sudeley make it abundantly clear that no such interest lies with the next of kin. Both the legal and the equitable interests in the property of a deceased person vest in the personal representative. The interest of the next of kin is in the estate itself and may be roughly compared with the interest of a shareholder in a company.

Sudeley really resolved the issue that arises in this case. That resolution was subsequently confirmed in Livingston and several other cases.

In Sudeley the testator who died domiciled in England left one-fourth of his real and personal estate to his wife absolutely. His estate included mortgages on real property in New Zealand. For the purpose of determining liability for probate duties it was necessary to determine the nature of the interest of the widow. Was her interest one in the estate which would be deemed to be English property or one in the mortgages themselves which would be New Zealand property?

The testator in that case was Algernon Tollemache. The wife subsequently died and it was her executors who were parties to the action. Lord Herschell said at page 19:

> If it was open to [his] executors in the course of administration to make over to her these New Zealand mortgages, it was equally open to them to make them over to other legatees and not to her. And if that be the right which an executor possesses, not only to select what assets he shall use for the purpose of paying debts, but also to determine the mode of administration, by an arrangement with the legatees as to what portion of the estate shall go to this or that legatee, it seems to me impossible to say that at the time of the death of the testatrix her executors were in a position to insist that a certain portion of these mortgages, or an interest in an undivided fourth part of these mortgages, was a part of the estate of the testatrix. In truth, the right she had was to require the executors of her husband to administer his estate completely, and she had an interest to the extent of one-fourth in what should prove to be the residuary estate of the testator, Algernon Tollemache.
>
> (Emphasis added)

At page 20 he said:

> The claim of Mrs. Tollemache's executors and trustees was really a claim to a share of the residue, and it had never been changed by allocation either by Mr. Tollemache's trustees, or by arrangement with the other persons interested, so as to make the right of these executors a right to specific assets.

Lord Davey said at page 21:

> What, then, are the rights of the appellants? Their right, and the only right which they could enforce adversely, is to have the administration completed and the residuary estate ascertained and realized, either wholly or so far as may be necessary for the purpose, and to have one-fourth of the proceeds paid to them.

Dealing with in specie distribution Lord Davey continued:

> The residuary legatees may no doubt agree between themselves to take any portion of the estate in specie, or an appropriation may be made of particular portions of the estate in satisfaction of any share by any fair agreement between the executors and the residuary legatees, or a scheme of division of that kind might no doubt be made by the executors either with the sanction of the Court, or possibly at their own risk.

Livingston involved a somewhat similar situation. In that case the testator died in New South Wales leaving one-third of his real estate and the residue of his personal estate to his widow. Some of the estate was located in Queensland. The Commissioner of Stamp Duties for Queensland claimed succession and probate duties on property of the deceased in Queensland. The question was whether she had a beneficial interest in property in Queensland. The widow married a Mr. Coulson after her first husband's death but died shortly thereafter.

Viscount Radcliffe said at page 707:

> When Mrs. Coulson died she had the interest of a residuary legatee in the testator's unadministered estate. The nature of that interest has been conclusively defined by decisions of long-established authority, and its definition no doubt depends upon the peculiar status which the law accorded to an executor for the purposes of carrying out his duties of administration. There were special rules which long prevailed about the devolution of freehold land and its liability for the debts of a deceased, but subject to the working of these rules whatever property came to the executor virtute officii came to him in full ownership, without distinction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit; and these duties would be enforced upon him by the Court of Chancery, if application had to be made for that purpose by a creditor or beneficiary interested in the estate.

Viscount Radcliffe quoted the following passages from the decision of Viscount Finlay in Dr.

Barnardo's Homes v. Special Income Tax Commissioners, [1921] 2 A.C. 1:

> ... the legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete.
>
> (Emphasis added)

He also quoted Viscount Cave in the same case:

> When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue, as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purposes of administration.

Viscount Radcliffe concluded on this issue at page 713 by saying:

> ... while it may well be said in a general way that a residuary legatee has an interest in the totality of the assets (though that proposition in itself raises the question what is the local situation of the "totality"), it is in their Lordships' opinion inadmissible to proceed from that to the statement that such a person has an equitable interest in any particular one of those assets, for such a statement is in conflict with the authority of both Sudeley and Barnardo and is excluded by the very premise on which those decisions were based.

Sudeley, Livingston and Bernardo were cases dealing with the residue of an estate where there was a will. The law is no different with respect to the estate of an intestate. It is said that the Intestate Succession Act is nothing more than the will of an intestate written for him by the Legislature. Certainly the interest of a residuary legatee subject to municipal law and any particular provisions of the will is no different than the interest of the next-of-kin where there is an intestacy.

In In re Leigh's Will Trusts, [1970] 1 Ch. 277 at pages 281 and 282 Buckley, J. summed up

the propositions to be drawn from Livingston in these terms:

> ... (1) the entire ownership of the property comprised in the estate of a deceased person which remains unadministered is in the deceased's legal personal representative for the purposes of administration without any differentiation between legal and equitable interests; (2) no residuary legatee or person entitled upon the intestacy of the deceased has any proprietary interest in any particular asset comprised in the unadministered estate of the deceased; (3) each such legatee or person so entitled is entitled to a chose in action, viz. a right to require the deceased's estate to be duly administered, whereby he can protect those rights to which he hopes to become entitled in possession in the due course of the administration of the deceased's estate; (4) each such legatee or person so entitled has a transmissible interest in the estate, notwithstanding that it remains unadministered.

The Livingston decision has been followed or referred to without disapproval in several Canadian cases including Montreal Trust Co. v. M.N.R. (1971), C.D.C. 488 (F.C.C. T.D.), Her Majesty the Queen v. Estate of S.D. Eide (1973), D.T.C. 6286 (F.C.C. T.D.), Ogilvie-Five Roses Sales Limited v. Hawkins et al (1979), 4 E.T.R. 163 (Alta. S.C.T.D.), Re Farrell Estate (1983), 44 Nfld. & P.E.I.R. 251 (Nfld. S.C.T.D.) and Conetta v. Conetta (1990), (Ontario District Court, unreported).

In the context of this case, the law is that the respondent has no legal or equitable interest in land of the estate of the late Thomas Mugford. The deed to the respondent from his father and the deed from his father's estate purported to convey land in which John Thomas Mugford as one of the next of kin of Thomas Mugford had no interest.

The interest which John Thomas Mugford had and the only interest which he could pass on to his son or to anyone else was an interest in the estate of Thomas Mugford. This interest has been described as a chose in action, a right to have the estate administered according to law and to receive a distributive portion of the estate when the debts of the estate and the administrative and other costs have been discharged.

The disputed land may prove to be the principal or, even, the sole asset of the estate of Thomas Mugford. The administrator, if and when one is appointed, may have to face the claim of Ernest Mugford claiming, through the estate of Joseph Mugford, a possessory title or a statutory defence by reason of 20 years possession. If such claim is successfully resisted by such adminstrator, then the land may be sold and, subject to the payment of debts and expenses, the proceeds distributed. The administrator, if the land does not have to be sold to pay debts and expenses, might consider in specie distribution. It is probably impractical and possibly unlawful to make an in specie distribution without the consent of those entitled. In this case it would mean that the estates of seven deceased persons would each receive a one-seventh undivided interest in the disputed land.

The conclusion to be drawn is that the respondent, having no interest in the land, has no standing to bring the action. Although it was, as described by the trial judge, a dispute between Gordon Mugford and Ernest Mugford, it was a dispute over nothing. While Ernest Mugford may or may not have acquired possessory title or a statutory defence, it is the role of the administrator and not the role of Gordon Mugford to put this to the test.

The action was wrongly conceived for this reason, if for no other, and ought not to have

proceeded. The appeal is allowed. The judgment of the trial judge is set aside. The appellant may have his costs both here and in the Trial Division.

GOODRIDGE C.J.N.

I concur: O'NEILL J.A.

I concur: CAMERON J.A.