Case Comment: Re: Estate of Dominico Grillo

by Angela Casey[1]

Can an Ontario litigant bring a will challenge here to set aside a will made in Italy? This interesting question was recently answered affirmatively by Justice Newbould in the recent decision in *Re Estate of Domenico Grillo*.[2]

Domenico Grillo, an Ontario resident, decided to take a vacation to Italy. Ultimately, he died while vacationing there. Leading up to his death, there were a number of suspicious things happening in Italy. Mr. Grillo's daughter, Antonina, and her two siblings had received several "very suspicious" calls from Anna, a cousin in Italy. Mr. Grillo's children therefore went to Italy to check on their father and discovered that the house he was staying in had been looted and over 13,000 euros had been withdrawn from his bank account.

After the funeral, Mr. Grillo's three children received a new holograph will, which Anna claimed had been handwritten by the deceased while vacationing in Italy. Instead of dividing his estate equally among his three children as his previous will had, the purported new will divided his estate equally among his three children and Anna. The purported new will did not appear to contain the deceased's handwriting or his signature and indicated the wrong date of his birth. An Italian handwriting expert concluded that the holograph will was not made in the deceased's handwriting. Anna and members of her family were criminally charged in Italy for theft and for registering a forged will.

Meanwhile, Anna had already sent the forged holograph will to the bank in Ontario, with the result that the bank had frozen the estate assets pending a judicial determination of which

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[2] *Re: Estate of Domenico Grillo,* 2015 ONSC 1352 ("Grillo").

will was valid. Antonina therefore applied to court in Ontario for a declaration that the Italian will was invalid and that the deceased's prior will was valid.

It appears from the decision that at the initial hearing date, Anna raised the issue of whether an Ontario court could assume jurisdiction over the validity of an Italian will. Justice Newbould invited the parties to make submissions on this point, and reconvened a hearing to determine whether Ontario had jurisdiction to hear the application.

To determine this question, Justice Newbould applied the test set out in *Van Breda*[3]. In that case, the Supreme Court held that a case with a multijurisdictional aspect must have a real and substantial connection to the jurisdiction in question such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum.

In many cases, there will be more than one court in a position to assume jurisdiction over the dispute. To assume jurisdiction, the court does not have to find that it is the best jurisdiction to determine the dispute. If a real and substantial connection exists, the court must assume jurisdiction[4]. If the respondent/defendant then wants to challenge on the basis that there is another jurisdiction that is *clearly* more suitable, the challenger may bring a *forum non conveniens* motion. On such a motion, the burden rests on the party challenging jurisdiction to show that there is another jurisdiction which is clearly preferable to the one chosen by the plaintiff/applicant.

To determine whether there is a "real and substantial connection", the Court will look for presumptive connecting factors, or factors which tend to show a connection between the dispute and the chosen jurisdiction. In *Van Breda,* the Supreme Court listed various recognized presumptive factors applicable to tort disputes, but explained that the list of presumptive factors

[3] *Club Resorts Ltd. v Van Breda*, 2012 SCC 17 [2012] 1 S.C.R. 572 ("*Van Breda*")
[4] *Van Breda*, at paragraph 99.

was not exhaustive and that new presumptive factors could be established in future disputes. The Supreme Court provided guidance in *Van Breda* on when and how to recognize new presumptive factors.

While there is a substantial body of law that has been developed with respect to recognized and new presumptive factors in tort and contract law, I am unaware of any decision prior to *Grillo* in which an Ontario court has considered the application of the *Van Breda* test to a will challenge.

In *Grillo*, Justice Newbould used the guidance provided by the Supreme Court in *Van Breda* to determine that there were presumptive factors connecting the dispute to Ontario that should be recognized in this case. The starting point, he found, is Rule 17.02 of the *Rules of Civil Procedure*. Rule 17.02 sets out a list of circumstances in which a litigant may serve a party outside of jurisdiction with an originating process without a court order. In *Grillo*, the issue was the interpretation and validity of a will. Rule 17.02(b) permits service without a court order in respect of the administration of a deceased's estate in respect of personal property where the deceased was a resident of Ontario at the time of death. Rule 17.02(c) allows such service with respect to setting aside a will in respect of personal property in Ontario. Here, the Deceased was resident in Ontario (even though he died in Italy) and some of his assets were located in Ontario.

Justice Newbould held that Anna should have expected that the determination of the validity of the handwritten will would take place in Ontario as that was where the deceased's children lived, where the deceased was domiciled, and where some of the deceased's bank accounts were located. The Court concluded that these factors, together with Rules 17.02(b) and (c) were presumptive connecting factors giving Ontario jurisdiction to deal with the handwritten will.

The decision in *Grillo* establishes that the following are presumptive factors entitling an Ontario Court to assume jurisdiction over a will challenge:

(a) the domicile of the deceased in Ontario,

(b) the location of the estate's beneficiaries in Ontario,

(c) the location of estate assets in Ontario, and

(d) Rules 17.02 (b) and Rule 17.02 (c) of the Rules of Civil Procedure.

A separate question addressed by the Court in *Grillo* was whether Ontario law or Italian law governed the issue of which will was valid. Under section 36(2) of the *Succession Law Reform Act*[5], the governing law in respect of immovable property (like real estate), is that of the jurisdiction where the real property is located. Here, with respect to immovable property, (like bank accounts), the governing law was that of the deceased's domicile. Accordingly, applying section 36(2) of the SLRA, the Court found that the validity of the competing wills was to be determined by applying Ontario law.

Ultimately, the evidence against the purported Italian will was fairly overwhelming, so not much seemed to turn on whether Ontario law or Italian law governed - a forged will would likely not have been valid in either jurisdiction. Justice Newbould had no difficulty concluding that since the deceased did not write the handwritten will, it was not valid. He also made an order declaring the validity of the deceased's prior will.

[5] *Succession Law Reform Act*, RSO 1990, c S.26 ("SLRA")