SUPREME COURT OF NOVA SCOTIA
Citation: *Keddy v. Keddy Estate*, 2016 NSSC 194

Date: 2016-07-22
Docket: Probate No. K/K 12937
Registry: Kentville

Between:

Brad Keddy

Applicant

v.

Estate of Henry Robert Keddy

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	May 27, 2016, in Kentville, Nova Scotia
Final Written Submissions:	June 17, 2016
Counsel:	Jonathan Cuming, counsel for the Applicant, Brad Keddy
	Eric Sturk, Greg Affleck, counsel for the Estate of Henry Robert Keddy

By the Court:

[1] This is a costs decision involving estate litigation.

The Application

[2] On February 25, 2016, Brad Keddy filed an application in Probate Court to revoke the Grant of Probate of his father's November 7, 1974, will, issued on May 20, 2014. In the 1974 Will, the testator left his entire estate to his son Troy Keddy and appointed him executor when he obtained the age of majority.

[3] The application was heard and dismissed in an oral decision delivered on May 27, 2016.

[4] The unsuccessful applicant seeks "at the very least" party-and-party costs against the estate in the amount of $6,250.00 plus HST. He estimates his legal costs at about $14,000.00.

[5] The respondent estate submits that the applicant's claim was entirely without merit and unnecessary. It seeks party-and-party costs against the applicant in the amount of $8,250.00 plus costs.

[6] The respondent notes that the applicant made an offer to settle before the hearing on the basis that the applicant would receive an amount of $43,500.00 in cash and estimated land value.

Summary of the Facts and Hearing Decision

[7] The facts as found by the court (affidavits and cross-examination of the primary affiants Brad Keddy and Troy Keddy) give relevant context.

[8] A concise summary, accepted by the court is set out in Troy Keddy's affidavit at para 3:

> (a) In 1974, when I was 13 years old, my mother and father divorced. At that time, my father told me that if I would continue to live with him on his farm at **** Aylesford Road, Aylesford East, Kings County, he would leave the farm and property to me if I stayed with him. Brad Keddy left and lived with our mother.
>
> (b) After my parents split up, I continued to live with my father until 1981. In 1981, I got a building lot at **** Aylesford Road, which was next door to my father's place.
>
> (c) After my parents divorced, I helped my father operate his farm and maintain his woodland. After I began living on my own in 1981, I continued to maintain a close relationship with my father and to assist him in running his farm and managing his property. My father was a butcher and a farmer. We worked together, farming, and butchering. We had a small abattoir, which was a two man operation. We cut and wrapped sides of beef, deer for hunters, and poultry. We worked together until my father stopped butchering at about age 65. I operated the business on my own after that time.

(d) In 1988, my father gave me a deed conveying his woodlot to me, and a document which appeared to be his will. Both documents had the same date. The deed is dated 1988. My father asked me to keep them. I read the will. It left my father's entire estate to me, except for a gift of $1,000.00 to my oldest brother, Wayne Keddy, and a snowmobile to my brother-in-law, Sandy MacLellan.

(e) My father lived in a common law relationship with Rose Acker, who died in 1992.

(f) After Rose Acker died, my father continued to live in his own home, and come to my house for meals every day.

(g) When my father was about age 90, he had trouble taking his medication properly, so he moved in to my home, and my girlfriend Mary Melanson and I cared for my father until he died at age 92. My brother Brad did not have a relationship with my father, and rarely visited him, or telephoned him.

(h) I stored the will that my father gave to me in 1988 in a locked closet in my home. From 1988 until we separated in 2006, only my wife, Delila Bourgais and myself had access to the closet. When Ms. Bourgais and I divorced in 2006, she cleaned out the closet. I did not realize until after my father died that the will was missing.

(i) Following my father's death, I was unable to locate the 1988 will. I looked for the will and also contacted Ms. Bourgais to ask her whether she had accidentally taken it when we split up. Ms. Bourgais said that she did not know where the will was. Ultimately, I was not able to find the 1988 will. I believe that it was accidentally lost or destroyed when Ms. Bourgais and I split up.

(j) Following my father's death, my siblings, who are listed in paragraph 2, above, and I met at Chris Parker's office. Mr. Parker is the lawyer who prepared the 1988 will and deed that I described in paragraph (c), above.

(k) I advised Mr. Parker and my siblings that I could not find a will for my father. Mr. Parker advised us that he could not locate his file with respect to my father's 1988 will because it had accidentally been destroyed. I also advised Mr. Parker and my siblings that I reviewed the 1988 will that my father gave to me and that it left my father's estate to me, except for the two gifts indicated in paragraph (f), above.

…

(m) In recognition of the care that I provided to my father following his divorce from my mother and up until his death, all of my siblings, except for Bradley Keddy, agreed that my father's estate should be distributed according to the terms that I described as being set out in my father's 1988 will.

…

> (o) Because Bradley Keddy disagreed with the terms of my father's 1988 will as I reported them, Mr. Parker began to negotiate an alternative distribution of my father's estate between my siblings and me. Mr. Parker prepared an agreement for Bradley and I to sign regarding the distribution of my father's estate. After receiving independent legal advice, I decided not to sign the agreement that Mr. Parker drafted.
>
> (p) Before Mr. Parker submitted the documents that would have had my sister, Doreen, appointed as administrator of my father's estate, I was able to locate a will signed by my father and dated 1974. I took the 1974 will to Mr. Parker's office and he recommended that it should be submitted to the Probate Court.
>
> (q) The 1974 will left my father's entire estate to me. The only difference between the 1974 will and the 1988 will is that the 1988 will gave $1,000.00 to my oldest brother, Wayne Keddy, and a snowmobile to my brother-in-law, Sandy MacLellan.
>
> …

[9] Thereafter, the 1974 will was admitted to probate.

[10] An affidavit of Chris Parker was in evidence. He was not cross-examined. Other affiants stated that Mr. Parker's file was lost or destroyed several years ago. Mr. Parker identified his invoice of December 8, 1988, to Henry Keddy which reads:

> Preparation of Quit Claim Deed from you to Troy Bradley Keddy, and preparation of your Law Will and Testament.
>
> IN ALL $110.00

He identified the deed for the woodlot, executed in his office on December 9, 1988. Respecting the will, he stated:

> While I am certain that the Will document referenced in Exhibit "A" [the invoice] was also prepared by my office, I have no recollection of whether it was, in fact, executed in my office.

[11] The applicant submitted that the court should infer, on a balance of probabilities, that the 1988 will contained a clause revoking any prior will and that it was properly executed (a presumption), but that there was insufficient evidence to establish the contents of the 1988 will. As a consequence, the court should revoke the Grant of Probate of the 1974 will, leaving an intestacy in the estate of Henry Keddy.

[12] The respondent argued that there was insufficient evidence that the 1988 will was executed.

[13] Based on the affidavits and cross-examinations, the court found:

1. The applicant did not establish that the 1988 Will was executed.

2. The contents of the 1988 Will were established through the evidence of Troy Keddy and corroborated in accordance with s. 34 of the *Nova Scotia Evidence Act* and as described in the case law, including *Re Winters Estate*, *Re Novak Estate* and *Re Harvey Estate*. In particular, the court was satisfied that the provision in the 1988 will, delivered by the testator to Troy Keddy and reviewed by him before he stored it in the locked cabinet, contained provisions whereby, except for the two bequests (that Troy Keddy honoured), he was the beneficiary.

3. The 1988 will was not in the testator's possession or control at the time it was lost; therefore, the presumption that, as a lost or destroyed will, it was revoked, does not apply to the facts of this case.

4. If the lost 1988 will contained a clause revoking prior wills (which is likely) and was properly executed (which is not likely), then any intent of the testator to revoke the 1974 was clearly - in context of the accepted evidence of the life long relationship between the testator and Troy Keddy and the evidence as a whole, revoked only on the condition that the 1988 will would be effective.

[14] In any of those scenarios, the beneficiary of the estate was Troy Keddy. There was no intestacy.

[15] The submission that the 1988 will, if executed, revoked the 1974 will, leaving an intestacy, had no merit whatsoever. It was contrary to the clear intent of the testator and, in the context of the family history, contrary to equity.

Analysis

[16] Estate practitioners sometimes view costs in estate litigation as being, in principle and practice, different from costs generally. Whatever may have been the case in the past, discussed a little further in this decision, the award of costs in estate litigation should follow the principles applicable to costs generally. There are four principal sources of guidance with respect to costs: the *Civil Procedure Rules*, statutes, texts and case law.

[17] *Civil Procedure Rule 77* applies to costs decision following litigation, including estate litigation. *CPR 77.03(3)* states that costs in a proceeding following the result, unless the judge orders otherwise. The starting point is that the loser pays.

[18] *CPR 77.02* gives a judge the discretion to make any order about costs that the judge is satisfied will do justice between the parties. Solicitor-client costs are available in litigation, but only in exceptional circumstances. *CPR 77.06* says that party-and-party costs in a proceeding follow the tariff, unless the judge orders otherwise.

[19] *CPR 77.07* authorizes a judge to add to or subtract from the tariff amount, using a non-exclusive list of factors relevant to that assessment. *CPR 77.18* sets out the tariff that guides courts in respect of party-and-party costs in most proceedings.

[20] The only other statute relevant to this costs decision is the *Probate Act*. Section 92(1) reads:

> In any contested matter, the court may order the costs of and incidental thereto to be paid by the party against whom the decision is given or out of the estate and if such party is a personal representative order that the costs be paid by the personal representative personally or out of the estate of the deceased.

[21] Section 102 reads:

> Where no provision is made in this Act or in the Probate Rules with respect to practice or evidence and in so far as this Act or the Probate Rules do not extend, the Civil Procedure Rules apply. 2000, c. 31, s. 102.

[22] Academics have written on costs. Markham Orkin, *The Law of Costs*, 2nd Edition, (Toronto: Carswell, looseleaf), described party-and-party costs in litigation that is consistent with our *Civil Procedure Rules*. Section 219.3 deals with estate litigation. It begins with the following statement:

> The general rule has been propounded that in cases involving estate litigation, as in other litigation, the successful parties should have their costs paid by the unsuccessful parties and not by the estate, unless the testator or the residual beneficiaries were the cause of the litigation.

[23] In Justice Coughlan's decision in *Jollimore Estate v Nova Scotia*, 2012 NSSC 8, at paras. 21 and 22, he cites an Ontario Court of Appeal decision and an article on costs and estate litigation by Ian M. Hull. It sets out several factors to be considered when a claim for costs is make out of an estate.

[24] Case law is helpful.

[25] The respondent refers the court to *Re Winters Estate*, 199 CarswellNS 429 ("*Winters*"), where the court awarded costs to a successful applicant against an estate in a claim that the court found should not have been contested in court by the estate. It also cites *Re Barrieau Estate*, 2008 NSSC 162 ("*Barrieau*"), in which the respondent was awarded costs against an applicant who pursued an application with negligible evidence.

[26] The applicant distinguishes the facts in *Barrieau* on the basis that the applicant was found to have forged ahead in search of financial gain despite having no basis to question the testator's competence.

[27] The applicant refers to the court to *Komonen v Fong*, 2013 NSSC 299 ("*Komonen"*); *Fort Sackville Foundation v Darby Estate*, 2010 NSSC 45("*Fort Sackville Foundation*"); and, *Wittenberg v Wittenberg Estate*, 2014 NSSC 301 ("*Wittenberg*").

[28] In *Winters*, the court held that the estate acted unreasonably, denied the executor costs against the estate and awarded the successful applicant costs out of the estate. This is not a case that supports that all parties get their costs out of an estate. In *Barrieau*, the court denied the unreasonable and unsuccessful applicant costs against the estate and awarded the estate costs against the unsuccessful applicant.

[29] In *Komonen*, the applicant was unsuccessful in proving that a partially completed and signed, but unwitnessed, document that purported to be a will met the threshold for admission as a testamentary document and, instead, held it to be an unfinished draft of a possible will. The applicant was awarded costs from the estate. The decision to award costs consisted of one sentence without analysis. It appears, or I infer, that costs were awarded on the basis that the application was a reasonable and *bona fide* application based upon the unfortunate wording of a document prepared by the testator.

[30] In *Fort Sackville Foundation*, a society sought to expand the *Cy-pres* doctrine to receive benefit from an estate, awarded to another society that had folded. The court awarded costs to the unsuccessful applicant. It stated that the particular circumstances of that case gave rise to the exceptional circumstances referred to in *CPR 77.03(2)*. The dispute and need for court determination was held to have been created less by the parties than by the unfortunate wording of the testator. The court held that the testator's wording justified the applicant's application.

[31] In *Wittenberg*, the applicant challenged the validity of his mother's will. The applicant was able to raise sufficient suspicious circumstances that the court placed the onus on the respondent to prove proper execution. The court found specifically that the applicant was not motivated by improper considerations. Because the application was held to have been reasonable, requiring the respondent to discharge the burden raised by suspicious circumstances, the unsuccessful applicant was awarded some costs against the estate.

[32] The court in *Wittenberg* cited an approach to costs set out by our Court of Appeal in *Casavechia v Noseworthy*, 2015 NSCA 56, where at para. 63, the court wrote:

> Traditionally, the courts ordered that all, or most of, the costs of all the parties to estate litigation be paid out of the estate. In recent years that approach has been reviewed in several jurisdictions: see *St. Onge Estate v. Breau*, 2009 NBCA 36, Robertson and Quigg JJ.A. *McDougald Estate v. Gooderham*, [2005] O.J. No. 2432 (Ont. C.A.); and *Feinstein v. Freedman*, 2014 ONCA 205.

and then proceeded to cite the relevant portions of *CPR 77* and s. 92 of the *Probate Act*.

[33] In this case, the pursuit of the application to a hearing after receipt of the affidavit evidence was not reasonable. The case had no chance of success. Equity was entirely on the side of the respondent. This was not a case that the words of the testator in a document justified the litigation. It was somewhat incongruous that the applicant would submit that there was sufficient evidence to prove a properly executed 1988 will, revoking a 1974 will, but insufficient evidence of the provisions of the 1988 will.

[34] With respect to s. 45 of the *Evidence Act*, there is ample case law upon which it should have been clear that the corroboration did not require a second witness or document to corroborate the contents of the 1988 will. Rather it required circumstances that would tend to confirm the evidence of the beneficiary. In this case, the corroboration is the family history and the fact that Troy Keddy had honored the bequests that he stated were contained in the 1988 will.

[35] This case was without merit. This case is distinguishable from estate litigation that arises less by greed and more by a legitimate inquiry into the words and intent of a testator.

[36] This litigation did not arise out of actions or the fault of the deceased testator or the respondent beneficiary. The litigation did not arise out of a legitimate interpretation issue. There were no reasonable grounds for the litigation. There were no suspicious circumstances. The court's scrutiny and supervision was not warranted. On the contrary, the proceeding was unwarranted and unjustified. The proceeding was unnecessary. At best, it should have been discontinued at an early stage.

[37] The applicant's request for costs against the estate is dismissed.

[38] In my view, the circumstances of this case are similar to *Barrieau*, where the respondent was awarded costs against the applicant.

[39] I have a problem with the historic concept that estate litigation creates a 'free for all' by all litigants to claim costs against an estate. This encourages unreasonable litigation and is contrary to the general principles enunciated in *CPR 77* respecting litigation generally. Costs flowing from estate litigation should apply *CPR 77*, which rule allows for exceptional circumstances. Normally, the loser should pay.

[40] In this case, equity was not on the applicant's side, and there was no factual or legal basis for the litigation to continue after disclosure. The successful respondent should not, in the circumstances of this case, have to pay all his lawyer's costs – which is the effective result if no costs are awarded against the applicant. This is not however an exceptional circumstance where the applicant should pay reasonable solicitor-client costs.

[41] The starting point for party costs *(CPR 77.06)* is Tariff A. The tariff amount for litigation involving a claim of between $40,000.00 and $65,000.00 on Scale 2 (basic scale) is $7,250.00, plus $2,000.00 for a full-day hearing. In addition, there were other appearances required of the respondent. This may be adjusted to "do justice between the parties".

[42] The applicant is ordered to pay the respondent costs of $5,000.00.

Warner, J.