NOVA SCOTIA COURT OF APPEAL
Citation: ***Casavechia v. Noseworthy***, 2015 NSCA 56

Date: 20150611
Docket: CA 426686
Registry: Halifax

Between:

Glenna Casavechia

Appellant
Respondent by Cross-Appeal

v.

Shannon Noseworthy and The Bank of Nova Scotia Trust Company, as personal representative of the Estate of Louis Joseph William Casavechia, Sheldon Casavechia, Nicole Casavechia, Josh Downey and Jace Downey

Respondents
Appellant by Cross-Appeal Shannon Noseworthy

Judges:	Saunders, Oland and Scanlan, JJ.A.
Appeal Heard:	February 9, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed, and cross-appeal allowed, per reasons for judgment of Oland, J.A.; Saunders and Scanlan, JJ.A. concurring
Counsel:	Jeremy Gay, for the Appellant / Respondent by Cross-Appeal Richard Niedermayer and Tanya Butler, for the Respondent / Appellant by Cross-Appeal Shannon Noseworthy Wayne J. Francis, for the Respondent The Bank of Nova Scotia Trust Company Sheldon Casavechia and Nicole Casavechia, Respondents in Person (not participating) Josh Downey and Jace Downey, Respondents in Person (not participating)

Reasons for judgment:

[1] Years after he made his Will, an elderly gentleman wrote a document, signed it, and put it in an envelope. After his passing, the envelope was opened. The issue before Justice Glen G. McDougall was whether that document was a holograph codicil to the Will. He found that it was, and awarded costs. This is an appeal from his order on the merits, and a cross-appeal from his order on costs.

[2] For the reasons which follow, I would dismiss the appeal against his order on the merits. I would allow the cross-appeal against his order on costs.

Background

[3] The late William Casavechia acquired several parcels of land in Cole Harbour, and subsequently sold off a number of lots. In 1996, the remaining 28 acres were consolidated as Parcel "WCY" (the "Property"). He and his wife, Glenna, lived there. Title to the Property was in Mr. Casavechia's name only.

[4] William Casavechia was survived by his wife and four children. Two, namely Gary Casavechia and the respondent, Shannon Noseworthy, were his biological children. His other two were Glenna's biological children, whom he had adopted.

[5] On October 2, 1996, William Casavechia made a Will. Its validity is not in dispute. Probate was granted. The respondent, The Bank of Nova Scotia Trust Company, succeeded John Casavechia as the Executor of the estate of the late William Casavechia.

[6] The Will dealt with the Property separately from the remainder of the estate. Clause 3(c) provides that it is to be held as a home for Glenna during her lifetime, or for such shorter time as she desires, or as the Executor, in his absolute discretion, considers appropriate. Glenna pays the cost of maintaining it while held for her, and if she needs funds to do so, the Executor can sell such portion of the Property as is deemed necessary. On Glenna's death, or if the Executor in its absolute discretion considers it no longer appropriate to keep it as a home for her, the Executor is to sell the Property.

[7] Clause 3(d) stipulates how the proceeds of the sale of the Property "or in the event that I have sold the Property during my lifetime" were to be divided and distributed. This included cash amounts to his children, grandchildren and wife, if alive at that time.

[8] As to the residue of his entire estate, after making certain bequests, Mr. Casavechia's Will left it to Glenna, if she survived him.

[9] The document in question is a handwritten letter dated Sunday Nov 14 / 010 [*sic*] and signed "Bill Casavechia." It was contained in a sealed envelope on which was written "Shannon". There is no question that the handwriting on the letter and envelope was that of William Casavechia, or that the signature on the letter was his.

[10] Here is an exact transcription of the letter:

> Sunday Nov 14 / 010
>
> Shannon Noseworthy my one and only Daughter at this time, this note is to confirm a prominis that I will give her a lake front Building lot on my property in Cole Harbor, Dartmouth the lot, the southern end borders Amorans land with a big oak tree on it. its to be free of all expenses taxes Etc. The lot will be taken out when my lake front Property is sold, and will be in accordance with other lake front lots. I hope this will be aggred with all concerned.
>
> My Reason for doing this is because I owe her a weding Honeymoon gift and I feel guilty because of it.
>
> With love her father
>
> Bill Casavechia

[11] Mr. Casavechia gave the sealed envelope containing this letter to Shannon after she visited him on a Sunday in 2010. He told her to put it away and wait to open it for the time being. She put it in a safety deposit box. After his passing on September 1, 2012, his daughter remembered the envelope and opened it.

[12] Shannon Noseworthy filed an application for proof in solemn form of the handwritten letter. Glenna Casavechia, her two biological children, and two grandchildren opposed it. The Executor took no position on the application.

[13] Justice Glen G. McDougall, sitting as a judge of the Court of Probate, heard the application. The issue was whether the 2010 letter written and signed by the late William Casavechia demonstrated the testamentary intention required to

establish a valid holograph codicil to his 1996 Will. The judge had affidavits sworn by Shannon Noseworthy; her husband, Lloyd Noseworthy; Gary Casavechia; William Casavechia's brother, John Casavechia; and Glenna Casavechia. Mrs. Casavechia was cross-examined on her affidavit. The parties filed several exhibits pertaining to proposed sales of the entire Property, or a portion of it, over the years for amounts up to $1,600,000.

[14] Since the 2006 enactment of s. 6(2) of the *Wills Act*, R.S.N.S. 1989, c. 505, as amended, holograph wills and codicils are valid testamentary instruments in Nova Scotia. In its entirety, s. 6 reads:

> 6 (1) No will is valid unless it is in writing and executed in manner hereinafter mentioned:
>
> (a) it shall be signed at the end or foot thereof by the testator or by some other person in the testator's presence and by the testator's direction;
>
> (b) such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
>
> (c) such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation is necessary.
>
> (2) Notwithstanding subsection (1), a will is valid if it is wholly in the testator's own handwriting and it is signed by the testator.

[15] After stating that there was no dispute that the letter signed by Mr. Casavechia met the technical requirements of a holograph codicil in s. 6(2), the judge continued:

> [50] In order to be a valid holographic instrument, the letter must not only comply with section 6(2) of the *Wills Act* but it must also demonstrate a testamentary intention or *animus testandi*. As the Supreme Court of Canada noted in *Re Gray*, *supra*, at p. 396:
>
> > There is no controversy, either in the reasons for judgment in the Courts below, or between the parties, that under the authorities, a holographic paper is not testamentary unless it contains a deliberate or fixed and final expression of intention as to the disposal of property upon death, and that it is incumbent upon the party setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of that character and nature…
> >
> > [Justice McDougall's emphasis]

He granted Shannon Noseworthy's application for proof in solemn form. His decision is reported as *Casavechia Estate (Re),* 2014 NSSC 73 (the "merits decision"). His order declaring the letter to be a valid holograph codicil, and ordering the Executor to submit it for a supplementary grant of probate, issued on April 2, 2014.

[16] The parties could not agree as to costs. After receiving and considering written submissions, the judge awarded Mrs. Noseworthy costs of $2,000 plus disbursements payable out of the estate. His decision is reported in 2014 NSSC 142 (the "costs decision") and his order on costs issued May 13, 2014.

[17] Glenna Casavechia appeals his order pursuant to the merits decision, and Shannon Noseworthy cross-appeals his order pursuant to the costs decision. The Executor takes no position on the appeal of the merits decision, and asks that the cross-appeal on costs be dismissed. The Court of Appeal Chambers judge ordered that all persons interested in the estate be served with certain documents pertaining to the appeal; this was done.

Issues

[18] In her appeal of the merits decision, Mrs. Casavechia enumerates several grounds, which can be reduced to a single issue:

> Did the judge err in finding that the letter contains a deliberate or fixed and final expression of intention as to the disposal of a lakefront lot to his daughter on his death?

[19] In her appeal of the costs decision, Mrs. Noseworthy submits that the judge erred by failing to consider:

(a) whether her applying for a determination of the validity of the letter as a testamentary instrument, after the Executor declined to do so, and

(b) whether the fact that the requirement for a determination of its validity was created by the testator

constituted exceptional circumstances within the meaning of Civil Procedure Rule 77.03(2).

[20] I will address the merits decision first, and then the costs decision.

Standard of Review of the Merits Decision

[21] As authority for her submission that ascertaining the intention of William Casavechia as expressed in the letter is a question of law so the applicable standard of review is correctness, the appellant relies on ¶ 8 of *Prevost Estate v. Prevost Estate*, 2013 NSCA 20. She does not, however, address its ¶ 9. Following is an extract from Bryson J.A.'s decision:

> [7] Much has been written about the principles governing the interpretation of wills. Often there is a debate about how far the court may stray beyond the language used by the testator in her will. But there is unanimity on the beginning (*Smithers v. Mitchell Estate*, 2004 NSCA 149):
>
> > [19] **The first duty of the court is to ascertain the intention of the testator from the language used in the will.** Regard must be had, not only to the whole of any clause in question, but to the will as a whole, which forms the context of the clause. Effect must be given, if at all possible, to all parts of the will. A fair and literal meaning should be given to the actual language of the will, the ordinary and grammatical sense of the words to be assigned unless the context otherwise dictates. The context may well include "surrounding circumstances". Only after the language employed by the testator has been approached in this fashion need resort be had to case law and legal rules to see if any modification is required. These principles were referred to with references to relevant authorities by Davison, J. in **Carter Estate Re:** (1991), 109 N.S.R. (2d) 384 (T.D.). The role of "surrounding circumstances" in this exercise was discussed by this Court in **Re: Murray Estate** (2001), 191 N.S.R. (2d) 63, at paras. 20-25.
> >
> > [Justice Bryson's bolding]
>
> [8] One might have thought that ascertaining intention is a question of fact. But courts have long held that ascertaining the intention of a deceased as expressed in her will is a question of law (Thomas G. Feeney and Jim Mackenzie, *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Toronto: Butterworths, 2000) ¶10.1). The Supreme Court has described it this way:
>
> > ... in construing a will, deed, contract, prospectus or other commercial document, the legal effect to be given to the language employed, is a question of law and in the construction of such a document, ...
> >
> > [*R. v. Alberta Giftwares Ltd.*, [1974] S.C.R. 584, at p. 588]
>
> [9] Sometimes it is necessary for the court to consider "surrounding circumstances" and to make findings of fact or mixed fact and law. When this occurs, the Court of Appeal can only interfere if the trial judge makes a palpable

> and overriding error. (See for example, *McCormick v. MacDonald*, 2009 NSCA 12 at ¶ 61.)
>
> [Emphasis added]

[22] In this case, the judge was not asked to interpret a document already accepted as testamentary in nature. Rather, he was required to determine whether it satisfied the requirements of s. 6(2) of the *Wills Act*, and demonstrated the requisite intention to dispose of property after death. This called for consideration of the document and surrounding circumstances, making findings of fact, and application of the law to the facts.

[23] In several cases where the issue was whether a document embodied testamentary intentions or dispositions, courts have stated that the determination was a question of mixed law and fact: *Hayward v. Hayward*, 2011 NSCA 118 at ¶ 15; *Norman Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 BCCA 277 at ¶ 16. In this case, unlike *Hayward*, there is no extricable legal issue. The appropriate standard of review is palpable and overriding error.

The Merits Decision

[24] The parties agree that, in considering whether the letter was a valid testamentary instrument, the judge identified the correct test, namely, the one set out in *Re Gray Estate*, [1958] S.C.R. 392 quoted earlier. His reasons continued:

> [52] Applying the test in *Re Gray*, I must consider the contents of the letter written and signed by William Casavechia along with the extrinsic evidence offered by the parties to determine whether the document contains a deliberate or fixed and final expression of intention as to the disposal of the lot upon death. For the reasons that follow, I am satisfied that it does.
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> [53] Although handwritten, the contents of the letter are of a more formal or ceremonious nature than one would expect of an ordinary note from a father to his daughter. For example, William Casavechia begins the letter by referring to his daughter by her full name and notes that she is his "one and only daughter at this time." The letter is dated and signed. William Casavechia placed the letter in a sealed envelope and handed it to Shannon Noseworthy with instructions not to open it for the time being. These facts all suggest that this letter was a significant document that William Casavechia – a man who had reached the age of 93 years by 2010 – did not want his daughter to read until he passed away.
>
> [54] The letter uses the language of "gift". William Casavechia states that the note is to confirm a promise that he will give his daughter a lakefront building lot and he describes the location of the specific lot in detail. All parties agree that the

letter refers to the same lakefront lot that the deceased typically reserved to himself when negotiating a sale of the property during his lifetime. The gift is to take effect when William Casavechia's lakefront property is sold. The deceased does not state that the gift is to take effect when he sells the property, but rather, when it is sold. As in Bowman, it can be implied from the language used by the deceased that the disposition is to be made following his death.

[55] William Casavechia goes on to say, "I hope this will be agreed with all concerned". Counsel for Mrs. Casavechia argued that by using this language the deceased intended to make the gift conditional on the agreement of all interested parties. I disagree. According to Mrs. Casavechia's evidence, the deceased was not a person who sought the permission of others to dispose of his property during his lifetime. The interpretation more consistent with the evidence is that this language was an expression of William Casavechia's hope that there would be no disagreements when his wishes were carried out after his death. Finally, the deceased provides a reason for giving his daughter the lot – he never gave her a wedding/honeymoon gift and feels guilty about it. The most reasonable inference is that William Casavechia wanted anyone who would read the letter to understand why he was giving the land to Shannon Noseworthy because he would not be there to explain the gift himself.

[56] With respect to the extrinsic evidence, the affidavits of Shannon Noseworthy, Lloyd Noseworthy and Gary Casavechia indicate that William Casavechia often spoke of selling the property and giving his daughter the lakefront lot. He also spoke of his desire to draft a new will.

[57] Glenna Casavechia testified that William Casavechia always intended for the land described in the letter to be their lot and he never expressed to her any intention to give it to Shannon Noseworthy. I accept that Mrs. Casavechia was not aware of any promises made by her husband to his daughter over the years that he would give her a lakefront lot when he sold the property. I accept that she was not aware that her husband harboured any guilt about a wedding gift or had any intention to amend his will in order to leave the lot to his daughter for this reason. That being said, this would be consistent with her evidence that her husband was old-fashioned, never discussed property and finances with her, and was accustomed to disposing of property without her knowledge or consent.

[58] Mrs. Casavechia also indicated in her affidavit and on cross-examination that Lloyd Noseworthy told her, during a phone call in December of 2012, that he made William Casavechia write the letter giving Shannon Noseworthy the lot. The tenor of Ms. Casavechia's evidence during cross-examination suggested that her relationship with Mr. Noseworthy is strained and I am not satisfied that this incident occurred in the manner she reports.

[59] It was argued by counsel for Ms. Casavechia that the letter does not contain a deliberate or fixed and final expression of William Casavechia's intention as to the disposal of the lakefront lot because the sale file for 379 Caldwell Road contains evidence that he was open to selling the lot with the rest

> of the property, if the price was right. In my view, the contents of the handwritten letter did not preclude William Casavechia from dealing with the lakefront lot during his lifetime. The letter contains a fixed and final expression of William Casavechia's intention as to the disposal of the lot in the event that the property was not sold before his death. If he had sold the property during his lifetime, the gift to Shannon Noseworthy would have simply failed in accordance with the rule of ademption.
>
> [60] I am satisfied, after considering the document as a whole and assessing the extrinsic evidence, that the handwritten letter meets the test in *Re Gray* for a valid holograph codicil. The codicil entitles Ms. Noseworthy to ownership of the lakefront lot at the time the remainder of her late father's property at 379 Caldwell Road is sold.
>
> [61] The location and size of the lot devised by codicil to Ms. Noseworthy is described in general terms. The parties will have to try to reach an agreement on the exact location and dimensions of the lot in accordance with existing subdivision requirements. If the parties cannot agree, the corporate executor may make the final determination or seek the assistance of the Court should it become necessary to do so. The Court will retain jurisdiction of the matter for this purpose.

[25] Glenna Casavechia submits that, in finding that the document her late husband wrote and signed contains a deliberate or fixed and final expression of intention as to the disposal of a lakefront lot to Shannon Noseworthy on his death, the judge erred. She raises several arguments.

[26] In his letter, Mr. Casavechia did not use words that clearly related to his passing. The appellant in her factum emphasizes:

> [35] … It does not state that it is a codicil or that it is a testamentary document. Nor does it use other words of testamentary expression such as "bequest", "will", "devise", "devisee", "Testament" or "upon death"; Nor does it expressly refer to, reconcile with, amend, add to or delete from the provisions of the Will dated October 2, 1996.
>
> [36] … The holograph paper does not express that the gift will take effect upon death. Further, by using the word "I" and not any of the expressions "my Estate", "my executor" or "my personal representative", it is submitted that William Casavechia intended the gift to be carried out by him personally in his lifetime.

She points out that, unlike the situation in *Canada Permanent Trust v. Bowman*, [1962] S.C.R. 711, the deceased did not use any terms ordinarily applicable to dispositions by will.

[27] In *Bowman*, the document wholly in the handwriting of the deceased named fifteen individuals, and nieces and nephews, as the recipients of specific items. The document disposed of all the assets the retired school teacher owned at the date it was made. At one point, she used the word "bequests" to describe items listed. According to extrinsic evidence, she expressed her intention to make a will a few months before the date of the document, and the persons named in it included all of her brothers and sisters, nephews and nieces.

[28] Martland J., writing for the Court, observed that the document did not appoint executors or dispose of the residue of the estate. However, its wording was a statement of the wishes of the deceased respecting the disposal of her property and it was implicit that such disposition was to be made following her death. The Supreme Court of Canada found that the document did contain a deliberate, fixed and final expression as to the disposition of the property of the deceased. It dismissed the appeal from the decision of the Appellate Division of the Supreme Court of Alberta.

[29] In *Bowman*, the finding that the document was a valid holograph will did not rest on the singular use of the word "bequests". That was but one of the factors considered.

[30] The late Mr. Casavechia was not a lawyer. It is not surprising that his letter did not use words and phrases that a lawyer, or perhaps a person more familiar with legal terminology pertaining to wills and estates, might have chosen. The test is whether, in all the circumstances, the document indicated a deliberate or fixed and final expression of intention as to the disposal of property upon death. The fact that it did not contain precise legal terminology, or expressly refer to an existing will, is not determinative.

[31] Mrs. Casavechia also submits that the judge erred by failing to consider extrinsic evidence. I reject this argument. It is apparent from a reading of his decision that he was conscious of the evidence pertinent to the determination of the issue before him, and did not restrict his analysis to the wording contained in the letter itself. Moreover, the judge specifically referred in his ¶ 52, 56 and 60 to the extrinsic evidence which he had to, and did, consider.

[32] Mrs. Casavechia then relies on the statement "I hope this will be aggred [*sic*] with all concerned". She submits that her late husband's references to his "hope" and to the agreement of "all concerned" dispels any possibility that the letter could

contain a fixed and final expression of intention to make a gift to Mrs. Noseworthy on his death. In her factum, she argues:

> … It is submitted that the "concerned" parties whose agreement was called for included the potential purchaser/developer of his Property, his wife, Glenna Casavechia, whose matrimonial interest in the Property would have to be released and quite possibly the officials responsible for subdivision approval. The agreement of these parties would have been necessary in order to effect a sale of all or part of the Property which excepted out the lakefront building lot intended as a gift to Shannon Noseworthy.

[33] Mrs. Noseworthy challenges the fairness of the appellant raising on appeal, the need for agreement of persons beyond Mr. Casavechia's remaining immediate family, namely his wife and his four children. She says this argument was not made previously, and so should not be entertained on appeal: *Perka v. The Queen*, [1984] 2 S.C.R. 232 at ¶ 9; *Ross v. Ross*, 1999 NSCA 162 at ¶ 34-35.

[34] In response, the appellant points to the pleadings. In her Notice of Objection to the Application for proof in solemn form, she had quoted from the letter: "I will give her a lake front building lot", "the lot will be taken out when my lake front property is sold" and "I hope this will be agreed with all concerned." Her Notice then continued: "These statements show that the deceased did not have a fixed and final expression of his intention but rather expresses a desire to dispose of property when a subdivision is complete and that it is to be approved by others." This extract from the Notice of Objection was quoted in her Pre-Hearing Memorandum, but that was all. The appellant acknowledges that any need for approval by a purchaser/developer, herself and municipal subdivision officials was not raised in written or oral submissions to the judge.

[35] I will not hear this argument on appeal. The statement of the Notice of Objection was made in support of the appellant's submission that the document supported a disposition of the Property by sale during William Casavechia's lifetime, and not following his death, rather than addressing the phrase regarding agreement "with all concerned." It is not at all clear the phrase "approved by others" she reproduced in her Pre-Hearing Memorandum referred to approvals by persons outside the immediate family, or that an argument relying on any extended definition was being made. In any event, that position was simply not raised or argued before the judge.

[36] Nor can I accept the appellant's submission that "I hope this will be aggred [*sic*] with all concerned" constitutes a condition which, if unsatisfied because one

or more of the immediate family does not agree, means that there was no fixed and final intention. The phrase "I hope" is precatory wording; it only expresses a wish and does not impose any imperative direction: see *Hayman v. Nicoll*, [1944] S.C.R. 253 at p. 262 which was quoted in *Saunders Estate (Re)*, 2005 NSSC 216 at ¶ 14-15.

[37] Then, according to Mrs. Casavechia, the language in the letter, namely "… the lot will be taken out when my lakefront property is sold", shows that the gift of the waterfront lot was dependant on the sale of the Property while William Casavechia was alive. She points out that this phrase does not read "when my lakefront property is sold after my death."

[38] However, the phrase without that additional wording already refers to the sale of the Property. As the judge pointed out, the writer used the past tense "when my lake front Property is sold" and did not state that the gift is to take effect when he sells the Property. As written, the wording does not preclude the gift of the lot being dependant on both the death of Mr. Casavechia and the sale of the Property.

[39] The appellant also observes that Shannon Noseworthy married on February 2, 1969 and, although over 27 years passed before Mr. Casavechia made his Will on October 2, 1996, he made no provision in that Will for a wedding gift of a lakefront lot to her. The fact that he did not do so in his Will, submits the appellant, is evidence that he did not intend to do so in the letter.

[40] In reply to this argument, Mrs. Noseworthy wrote in her factum:

> 49. No codicils would ever be made, nor any wills updated, if that were the case. The very purpose of a codicil is to revise a will that no longer accords with the testator's wishes. Just because the Testator did not include a gift of a lot to his daughter in his Will does not mean that he did not change his mind 14 years later and decide to change his Will. If he had done so by a formal codicil or new will, this argument would be clearly shown to be absurd as it actually is.

I agree with this reasoning, and reject the appellant's submission on this ground.

[41] In summary, the judge identified the correct legal test, considered the document as a whole and the extrinsic evidence before him, and applied the law. I have reviewed his reasons, and can detect no palpable and overriding error in his analysis or conclusion that the letter written and signed by the late William

Casavechia contains a fixed and final expression of his intentions as to the disposal of the waterfront lot in the event that the Property was not sold before his death.

Standard of Review of the Costs Decision

[42] An award of costs is discretionary. Hamilton J.A. in *Westminer Canada Ltd. v. Fraser*, 2005 NSCA 27 stated:

> [19] Section 801.5 in Orkin, *The Law of Costs*, 2nd ed. (Aurora: Canada Law Book, 2002) states the following with respect to when an appeal court will interfere with the discretion of a trial judge in setting costs:
>
> > Even though leave to appeal has been obtained, it does not follow that the Court of Appeal will readily or lightly interfere with the discretion of the trial judge under any circumstances. The exercise of the court's discretion as to costs should be interfered with on appeal only in limited circumstances. The Supreme Court of Canada has enunciated the general rule in these words: **'This discretionary determination should not be taken lightly by reviewing courts ... [U]nless [the trial judge] considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected.'** Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, p. 32 ...
> >
> > The proper question to ask on a motion for leave is whether the trial judge considered the relevant legal principles in arriving at a decision as to costs. ... **An appellate court may not substitute its discretion for that exercised by the court below, nor is it called upon to rehear the case. It will interfere with the disposition of costs only where the trial judge proceeded erroneously in law and failed to exercise his discretion, or where he exercised his discretion on grounds wholly unconnected with the cause.**
> >
> > **As had been said, an appellate court will be justified in interfering with the exercise of a trial judge's discretion only if the trial judge misdirects himself or herself, or if the decision is so clearly wrong as to amount to an injustice.**
>
> [20] As recently stated by this Court in **D.C. v. Children's Aid Society of Cape Breton Victoria**, [2004] N.S.J. 470 (Q.L.)(N.S.C.A.), ¶ 5, a decision to award costs is discretionary, and will not be interfered with by this Court unless wrong principles of law have been applied or the decision is so clearly wrong as to amount to an injustice. Both parties agree this is the standard of review.
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> [Justice Hamilton's emphasis]

Later in my reasons, I will refer to the *Fraser* criteria again.

[43] In *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, Justice Arbour for the Supreme Court of Canada stated at ¶ 27 with respect to the standard of review that "[a] court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong." See also *Minas Basin Holdings Ltd. v. Paul Bryant Enterprises Ltd.*, 2010 NSCA 17 at ¶ 17 and *Wadden v. BMO Nesbitt Burns*, 2015 NSCA 48 at ¶ 54.

The Costs Decision

[44] Shannon Noseworthy succeeded in her application for proof in solemn form. She submits that, in not awarding her costs on a solicitor and client basis from the estate and, instead, party and party costs, the judge erred.

[45] In his costs decision, the judge accurately recounted the positions the parties took on costs:

> [4] Counsel for the applicant Shannon Noseworthy is seeking costs on a solicitor/client basis for his client. In his written submission on costs he suggests:
>
> > If the executor had brought the Application, as it had an obligation to do and was invited to do, there would be no reason to deviate from the usual practice of awarding its costs form (*sic*) the estate on a solicitor client basis. In this situation, where the task of proving the document fell to a beneficiary, with a consequent increase in her legal costs, it is respectfully submitted that it is appropriate to treat her costs in the same way that the executor's costs would have been treated if it had assumed the burden of bring the Application.
>
> [5] Counsel for Glenna Casavechia, while foregoing a claim for costs for her own client, suggests that the Court should award costs in accordance with Tariff C of the *Costs and Fees Act* plus any disbursements that might be approved by the Court.
>
> [6] The range for an application lasting more than an hour but less than one-half day under Tariff C is $750.00 to $1,000.00.

He observed that the Executor was recommending an award of $1,000 under Tariff C plus provable disbursements, for the Mrs. Noseworthy.

[46] The judge's analysis is largely contained in these reasons:

> [9] It is readily apparent that the serious issue of deciding whether the Testator's letter demonstrated a testamentary intention was made more contentious by feelings of animosity between his biological progeny and his

second wife and her children from a previous relationship. This is a sad reality but one that is not unique to this fractured family.

[10] This, however, does not change the approach the Court must take in deciding what the appropriate award of costs should be.

[11] In **Veinot v. Veinot Estate** (1998), 167 N.S.R (2d) 101 (affirmed on appeal at 172 N.S.R. (2d) 111), Goodfellow, J. stated the following:

> 18 It is noted that the guidance of C.P.R. 63.12(1) is contained in Part I of the rules dealing with party and party costs. The court has long recognized the representative in an estate/fund has a duty to such estate or fund and the duty often requires the engagement of a solicitor. The representative should upon acting reasonably, have such solicitor's fees recovered on a solicitor/client basis from the fund. The practice has been to grant solicitor and client fees payable out of the estate/fund. Such should be taxed, (C.P.R. 63.24).
>
> 19 No such solicitor/client relationship exists with the estate by claimants who have entered into their own solicitor/client relationship which places them initially at least in no different position than any other party to litigation who engages his/her own solicitor and is responsible for such solicitor's fees in accordance with the individual terms of their retainer. At one time there was a tendency to look to the estate for all fees on a solicitor/client basis but no such automatic policy has been mandated by the Civil Procedure Rules. There is a clear trend to allow only the solicitor for the representative party solicitor/client fees, unless the claimants can establish circumstances warranting the exercise of discretion for granting them solicitor and client costs.
>
> 20 In my view there is no justification for starting at any other point than a possible discretionary award of party and party costs to a claimant for which payment may be directed out of the estate/fund.
>
> 21 If solicitor and client costs are warranted then such must be justified. There must be exceptional circumstances to warrant the exercise of discretion in any proceeding by awarding a claimant solicitor and client costs.

[12] I do not see any reason to award costs on any other basis than party and party. While there appears to be a heightened level of friction between the parties to this application there was no reprehensible conduct that could persuade the Court to award solicitor/client costs. Even if there was such conduct I would likely not order the Estate to pay the increased costs. I would likely have ordered any additional costs to be paid by one or other of the two principal protagonists while ordering the Estate to pay party and party costs based on Tariff C.

[Emphasis added]

[47] The judge referred to Rule 77.07(1) which allows a judge to add or subtract an amount to or from tariff costs. He observed that, while the hearing of the application did not exceed a half day, "significant affidavit evidence and rather comprehensive pre-hearing briefs of counsel" had had to be filed, and counsel obviously had to dedicate "considerable time and effort" to properly prepare for the hearing. In order to "… do justice between the parties" pursuant to Rule 77.02(1) and to "… award costs that are just and appropriate in the circumstances of the application" pursuant to the guidelines under Tariff C, he increased the costs award beyond the tariff range of $750.00 to $1,000.00. He awarded Mrs. Noseworthy $2,000.00 together with reasonable disbursements payable out of the assets of the estate at the time of its closing.

[48] Mrs. Noseworthy submits that the judge failed to give due consideration to the unique circumstances of this case. She says that she had to assume a duty normally undertaken by an executor, which would have been fully indemnified if it had applied for proof in solemn form of the letter. According to her, the judge failed to apply the correct principles of law, resulting in a costs award that worked an injustice upon her and thus deserving of appellate intervention.

[49] Before addressing whether the judge erred in his costs decision, I will consider an executor's duty to bring an application for proof in solemn form. I will also review the payment of the costs of an executor's legal fees, and that of other parties to estate litigation. Throughout my analysis, my reference to executors includes the legal personal representatives of an estate, and vice versa.

Applications for Proof in Solemn Form

[50] Mrs. Noseworthy maintains that it was the Executor's duty to make the application for proof in solemn form.

[51] In *Re Benbow Estate*, (1862) 2 Sw. & Tr. 487, 164 E.R. 1086 (Eng. Prob. Ct.), Sir C. Cresswell stated: ". . . it seems strange for the executors to call on any other person to propound testamentary papers." *Halsbury's Laws of England*, 4th ed., (London: Butterworths, 2000) in vol 17(2) at ¶ 271 states:

> … An executor who doubts the validity of a codicil should not cite the persons interested under it to propound it, but should proceed to prove the will in solemn form. …

Re Muirhead (deceased), [1971] 1 All E.R. 609 reiterated that it was the duty of an executor to execute the last wishes of a testator as expressed in all documents testamentary in nature, and thus to prove the validity of any document in question in solemn form. According to James MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed, loose-leaf (Markham, ON: LexisNexis Canada Inc., Last Updated: April 2015) at § 8.13, the general duties of an executor include "application made to the court of probate for the issue of proper grant of administration".

[52] However, the current probate regime in this province makes it clear that it is not only the executor who can apply for proof in solemn form; any person who comes within the definition of "a person interested in the estate" may do so.

[53] The *Probate Act*, 2000, c. 31 came into force in October 2001, together with the *Probate Court Practice, Procedure and Forms Regulations*, N.S. Reg. 119/2001. The *Act* and *Regulations* are silent as to who applies for a grant of probate or to prove a will in common form. However, it is clear from the leading texts and Probate Court Form 8, the application for a grant of probate which requires the applicant to swear "I am the executor of the deceased named in the attached will or codicil(s)", that the duty to apply for a grant of probate for a non-contested estate falls on the executor.

[54] What then of contested estates? Section 31 of the *Act* prescribes that wills may be proved in solemn form on application by "a person interested in the estate of the testator". Section 64(3) of Part IV of the *Regulations* which deals with the procedure for contested matters, including proof in solemn form, provides that a person interested in an estate can commence an application under Part IV.

[55] Section 63(1) of the *Regulations* defines "a person interested in an estate" as a personal representative of an estate or any of the persons referred to in ss. 52(1). The listing in s. 52(1) again refers to a personal representative, but also includes any residuary beneficiary and any unpaid non-residuary beneficiary.

[56] The procedure for applying for proof in solemn form is contained in s. 71(1) of the *Regulations*. Section 71(10) indicates that an application can be made by someone other than the personal representative:

> (10) If an application for proof of a will in solemn form is made by a person other than a personal representative named in the will, the personal representative may
>
> (a) contest the application; or

> (b) apply for an order that the application is frivolous or vexatious.

[57] This review of the *Act* and Part IV of the *Regulations* shows that the executor or personal representative of an estate is not the only person who can apply for proof in solemn form.

[58] How was it that Mrs. Noseworthy, rather than the Executor, brought the application for proof in solemn form of Mr. Casavechia's letter? After Mrs. Noseworthy opened the letter written by her father, her counsel sent it to the solicitor for the estate of William Casavechia. Her lawyer's letter of January 30, 2013 read in part:

> I kindly ask you to take instructions from the executor as to his position on the effectiveness of this document. Hopefully there will be an agreement for the executor to put this before the Probate Court as part of the deceased's testamentary documents. However, Ms. Noseworthy is prepared to proceed to have the document proved in Probate Court on her motion, if need be.

[59] On July 2, 2013, the solicitor for the estate replied with a letter which read in part:

> John Casavechia has filed an Inventory and an accounting of his administration of the Estate, copies of which are enclosed herewith. As you will note, the estate has limited liquid assets. In order to preserve these resources and not to prejudice the rights of any persons interested in the estate, the Personal Representative will not take any active role in relation to the proposed actions under the *Matrimonial Property Act, Testators' Family Maintenance Act* and the *Wills Act*. The Personal Representative will however cooperate and provide any assistance requested by the Court. The application in Probate Court for consideration of the November 14, 2010, letter as a testamentary instrument should be made by the proponent, Shannon Noseworthy.

The Executor having considered the matter and declined, Mrs. Noseworthy brought the application for proof in solemn form.

[60] As "a person interested in the estate", the Executor could have applied for proof in solemn form. It is clear from its correspondence that it did not simply decline or flat-out refuse. Nor did it decide to do so only because Mrs. Noseworthy was the sole beneficiary named in the letter. Rather, the Executor considered complex and interrelated matters pertaining to the administration of the estate, such as the limited liquid assets available, and the litigation against the estate proposed by the widow of Mr. Casavechia and by other family members. It

stated its intention to cooperate and provide any assistance the court should require. There is also merit to its argument that, even if it had commenced the application for proof in solemn form, matters were so contentious that members of Mr. Casavechia's family were likely to retain separate legal counsel in any event.

[61] Having considered the *Act* and its *Regulations* which do not oblige an executor to apply for proof in solemn form, and the circumstances of this particular case, I am of the view that the Executor should not be criticized for declining to apply for proof in solemn form, and asking Shannon Noseworthy, who is also "a person interested in the estate", to do so.

Costs of Executors

[62] That, however, does not dispose of the issue of whether Mrs. Noseworthy, who then successfully brought that application, should have been awarded her solicitor and client costs.

[63] 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.

[64] In the case under appeal, whether costs should be paid from the estate was not in dispute. All parties agreed that as the litigation regarding the validity of the handwritten letter arose as a result of Mr. Casavechia's action, costs should be paid from the estate.

[65] With respect to an executor's costs, in *Morash Estate v. Morash*, [1997] N.S.J. No. 403 (C.A.) at ¶ 22, Freeman J.A. for this Court noted:

> There is a cross appeal as to costs, which the trial judge awarded to the opponents of the will as well as to the executrix and proponents on a solicitor and client basis to be paid from the estate. He noted that the application and request for proof in solemn form was not frivolous, for suspicious circumstances were established. In wills matters the general practice appears to be for executors to be awarded solicitor and client costs to be paid from the estate in any event, for executors may have no personal interest in the outcome and no other source of reimbursement for their legal expenses. When the matter in contention is not frivolous, unsuccessful opposing parties usually have their costs paid from the estate as well, usually on a party and party basis, but occasionally, depending on

> the practice of the individual judge, on a solicitor and client basis. Costs are discretionary with the trial judge . . .
>
> [Emphasis added]

[66] In the costs decision under appeal, the judge quoted ¶ 18 from the 1998 decision in *Veinot Estate*, where Goodfellow J. stated that an estate representative should, upon acting reasonably, be granted recovery of its legal fees on a solicitor and client basis from the estate. At the time, Rule 63.12(1) of the 1972 *Civil Procedure Rules* stated that:

> Where a person is a party in the capacity of trustee, personal representative . . ., he shall, unless the court otherwise orders, be entitled to costs, insofar as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative, . . .

[67] Rule 77 in the current *Civil Procedure Rules* is silent on costs to a personal representative. It reads in part:

> **77.02** (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> . . .
>
> **77.03** (1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.
>
> (2) A judge may order a party to pay solicitor and client costs to another party inexceptional circumstances recognized by law.
>
> (3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.
>
> . . .
>
> **77.06** (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.
>
> . . .
>
> **77.07** (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

(2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

(a) the amount claimed in relation to the amount recovered;

(b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;

(c) an offer of contribution;

(d) a payment into court;

(e) conduct of a party affecting the speed or expense of the proceeding;

(f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;

(g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;

(h) a failure to admit something that should have been admitted.

[Emphasis added]

[68] For completeness, I would add that s. 92 of the *Act* which deals with costs in contested matters in estates proceedings reads:

Costs in contested matters

92 (1) 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.

(2) An order made pursuant to subsection (1) may be reviewed by the Nova Scotia Court of Appeal or any judge thereof in chambers, upon notice given in the prescribed manner and form by the party aggrieved to the opposite party, and such order may be made thereon as the Court or the judge considers just and proper.

(3) An order for the costs of an application may be made personally against a personal representative where the application is made as the result of the personal representative failing to carry out any duty imposed on the personal representative by this Act.

(4) An order for costs in an application may be made personally against a personal representative who has made the application where the application is frivolous or vexatious.

[69] The decision in *Jollimore Estate v. Nova Scotia (Public Archives)*, 2012 NSSC 8 issued after Rule 77 came into effect. After referring to that Rule and, among other authorities, this Court's decisions in *Morash* and *Fair Estate v. Fair Estate* (1971), 2 N.S.R. (2d) 556 (N.S.S.C.A.D.), Coughlan J. stated at ¶ 18:

> It has long been the law in Nova Scotia that in the case of executors and trustees their costs are paid out of the estate on a solicitor and client basis.

This Court's 2013 decision in *Prevost Estate* at ¶ 17 also indicates that generally, the personal representative of an estate will receive its costs from the estate on a solicitor and client basis.

[70] In summary, there is a long line of jurisprudence in this Province that has held that the costs of the executor or personal representative of an estate involved in litigation pertaining to the estate is entitled to costs from the estate on a solicitor and client basis if it has acted reasonably.

Costs of a Party other than Executors

[71] This Court's most recent statement on costs in estates litigation is found in *Prevost Estate*. There, Bryson J.A. for the Court stated:

> [17] It is often the case that parties in an estate dispute are awarded costs out of the estate. An adverse party may receive party-and-party costs; an executor or trustee will usually receive solicitor-client costs by way of indemnity. One cannot assume judicial generosity in all of these cases. Much will turn on whether or not the contested issue arises from conduct of the deceased. Generally, if the need for resort to the court was caused by the testator, costs will be borne by her estate, (*MacDonell, Sheard and Hull Probate Practice*, 4th ed. (Scarborough, Ont: Carswell, 1996) pp. 372-381). …

[72] The issue before the motions judge was whether, in the particular circumstances of this case, Mrs. Noseworthy was entitled to solicitor and client costs rather than party and party costs. I turn then to his costs decision. What were his reasons for refusing Mrs. Noseworthy, who successfully brought the application for proof in solemn form, her costs from the estate on a solicitor and client basis, as she requested?

[73] It is apparent from the statements in ¶ 4 of his costs decision that the judge had heard and appreciated Mrs. Noseworthy's position; namely, she deserved costs from the estate on a solicitor and client basis because proving the validity of the

letter written by her father fell to her only because the Executor refused to bring the application, and this constituted the exceptional circumstances under Rule 77.03(2). However, his decision did not speak to her argument. The judge did not turn his mind to it in his reasons.

[74] Rather, at ¶ 9, very early in his reasons, the judge highlighted the animosity within the family. Then, after quoting from *Veinot Estate*, he stated:

> [12] I do not see any reason to award costs on any other basis than party and party. While there appears to be a heightened level of friction between the parties to this application there was no reprehensible conduct that could persuade the Court to award solicitor/client costs. . . .

He founded his decision on whether there had been the sort of reprehensible conduct that would attract the sanction of solicitor and client costs.

[75] It is clear that solicitor and client costs may be awarded for reprehensible conduct in estates litigation: see *Veinot Estate* at ¶ 15; *Power Estate (Re)*, 2007 NSSC 126, at ¶ 11-14; *McCully v. Rogers Estate*, 2012 NSSC 435, at ¶ 9; and *Willisko v. Pottie Estate*, 2015 NSSC 45, at ¶ 19-29.

[76] In *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47, at ¶ 458, Saunders J.A. stated:

> It has long been settled law in this province that an award of solicitor-client costs is reserved for cases said to be "rare and exceptional". For example, in **Brown v. Metropolitan Authority et al.** (1996), 150 N.S.R. (2d) 43 (C.A.), Pugsley, J.A. said at p. 55:
>
> > [94] While it is clear that this Court has the authority to award costs as between solicitor and client, it is also clear that this power is only exercised in rare and exceptional circumstances, to highlight the court's disapproval of the conduct of one of the parties in the litigation (**P.A. Wournell Contracting Ltd. et al. v. Allen** (1980) 37 N.S.R. (2d) 125).
>
> See as well, **Campbell v. Lienaux et al.**, 2001 NSSC 44, aff'd on appeal 2002 NSCA 104; **Young v. Young**, [1993] 4 S.C.R. 3; **Winters v. Legal Services Society**, [1999] 3 S.C.R. 160; and **Minas Basin Holdings Ltd. v. Paul Bryant Enterprises Ltd.**, 2010 NSCA 17.

[77] The motions judge determined that there was no reprehensible conduct that would warrant solicitor and client costs. But Mrs. Noseworthy had never alleged reprehensible conduct. She did not claim that there had been such scandalous,

egregious or outrageous conduct, or actions tantamount to fraud, abuse of process or the like, that she should receive solicitor and client costs from her father's estate on that basis. Nor did any of her written or oral submissions claim exceptional circumstances founded on such behaviour or actions. Reprehensible conduct appeared for the first time in the judge's reasons.

[78] As the judge himself recounted in his decision, what Mrs. Noseworthy had argued was that she had had to bring an application for proof in solemn form because William Casavechia left a handwritten document and the Executor declined to bring the application. The reasons the judge gave for exercising his discretion and awarding party and party costs had nothing to do with the submissions made to him for solicitor and client costs.

[79] I return to *Fraser* on the standard of review, and when an appellate court can intervene in a costs decision without deference. With respect, the motions judge "considered irrelevant factors", namely, reprehensible conduct; "failed to consider relevant factors", namely, that in applying for proof in solemn form, Mrs. Noseworthy was standing in the place of the Executor; and "he exercised his discretion on grounds wholly unconnected with the cause", namely, reprehensible conduct, a ground that was not before him.

[80] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at ¶ 66, Justice Binnie described an error in principle thus: "In my view it was an error of principle not to address the factors for and against the exercise of the discretion which the court clearly possessed."

[81] In *Civil Appeals*, loose-leaf (Toronto: Carswell, Last Updated: April 2015), Donald J.M. Brown Q.C. describes the error when a decision relies on a ground that was not raised as follows (vol 2 at 13:3310):

> Deciding on a ground that was not put before an adjudicator or not contained in pleadings deprives parties of a decision that is responsive to their proofs and argument. In the words of Doherty J.A., "it is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings." In terms of adjudicative decision-making, the parties will have been deprived of presenting their cases as they have chosen and of making submissions in relation to the ground upon which the case was decided. Being a decision-making error, a finding based on a ground not pleaded is reviewable on the correctness standard.

Justice Doherty's statement is taken from *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (Ont. C.A.) at ¶ 60.

[82] Here, the motions judge decided the issue of costs based on a ground that was not advanced by the parties and ignored the ground that was advanced. The foundation for his decision was not what was argued before him, and he failed to consider or explain why a party, standing in the place of an executor, is not entitled to solicitor and client costs when, as I explained earlier, an executor is generally entitled to such costs. With respect, he erred in principle and appellate intervention is warranted.

[83] Earlier, I set out Rule 77.03(2) which states that "[a] judge may order a party to pay solicitor and client costs to another party in exceptional circumstances …". Moreover, I explained that the case law shows that an executor or personal representative who acts reasonably is entitled to costs from the estate on a solicitor and client basis. The motions judge did not address this jurisprudence which was central to Mrs. Noseworthy's submissions.

[84] In my view, entitlement to solicitor and client costs from an estate is not limited to executors and personal representatives and to reprehensible conduct warranting court sanction. As I will explain, there remains a residual discretion to award costs.

[85] The decision of Moir J. in *Fort Sackville Foundation v. Darby Estate*, 2010 NSSC 45 is illustrative. There, the testator's July 2007 will left his residence and the contents to a society which had ceased to exist several years earlier. Although he rejected the Foundation's arguments that it was the successor organization to that society and the *cy-près* doctrine operated in its favour, Moir J. awarded the Foundation costs from the estate on a solicitor and client basis. It is apparent that he exercised his discretion to do so because he felt that the circumstances warranted such costs, presumably because it is a relatively rare occurrence that a testator bequeaths his estate to a beneficiary that no longer exists.

[86] In *Peach Estate (Re)*, 2011 NSSC 230, the issue was which charitable organization was entitled to the residue of the estate. Murray J. employed similar reasoning to Justice Moir in *Fort Sackville* and awarded costs on a solicitor and client basis to all the claimants:

> [12] Accordingly, I find that the circumstances surrounding Mr. Peach's will did present exceptional circumstances which made it reasonable for all three parties to intervene in the application for interpretation. One can see the connection between each of them and the language contained in the will. All

> were potential recipients (although the Foundation was not mentioned in the will), depending on the interpretation, which was not obvious. …

[87] I would add that in *Fort Sackville Foundation*, Moir J. commented:

> [4] Disputes over a fund or an estate may give rise to exceptional circumstances as referred to in Rule 77.03(2). The discretion may be moved because the dispute, and the need for a determination, is created less by the parties than by the instrument that governs the fund or estate.

My identification of this case as one where a judge relied on his discretion to award solicitor and client costs in circumstances other than reprehensible conduct, is not to be taken as acceptance of the first sentence in this passage. Simply because the litigation may involve an estate does not automatically result in solicitor and client costs. As *Veinot Estate* and *Prevost* make clear, the normal rule is party and party costs, unless there are exceptional circumstances.

[88] In *Fort Sackville Foundation*, the applicant was unsuccessful, yet received solicitor and client costs, rather than party and party costs. The unsuccessful applicant in *Komonen v. Fong*, 2011 NSSC 315, which determined whether a printed will form, completed in pencil was a testamentary instrument, also received solicitor and client costs. I do not say that the success of an application, without more, will attract solicitor and client costs. I merely observe that here Mrs. Noseworthy was successful and was refused solicitor and client costs.

[89] The parties did not refer to any case in this province where the personal representative refused to propound a document which could be testamentary and another person performed this role. Here it was undisputed that the necessity of an application for proof in solemn form was caused by the acts of the late Mr. Casavechia, namely, his use of a handwritten document to express his testamentary wishes rather than formally updating his existing will with a lawyer. Had the Executor brought the application, it would have been entitled to solicitor and client costs from his estate. It declined to do so because of the particular circumstances pertaining to the administration of the estate of this testator. Mrs. Noseworthy then acted reasonably and properly in bringing the application and successfully propounded the handwritten will as a testamentary document. In my view, the combination of these circumstances are exceptional and justify solicitor and client costs.

Disposition

[90] I would dismiss the appeal from the merits decision.

[91] I would allow the cross-appeal from the costs decision, and award the respondent and appellant by cross-appeal, Shannon Noseworthy, solicitor and client costs in the proceeding below and on appeal, from the estate of the late William Casavechia. If the parties are unable to agree on the quantum of solicitor and client costs from the proceeding below, this issue shall be remitted to the judge for his determination. Costs on the application and on appeal shall be paid by the estate as soon as the Executor considers such payment possible and appropriate in the orderly administration of the estate.

Oland, J.A.

Concurred in:

Saunders, J.A.

Scanlan, J.A.