SUPREME COURT OF NOVA SCOTIA
Citation: *Baird Estate (Re)*, 2014 NSSC 444

Date: 20141216
Docket: Pictou No. 418536
Probate Court File No. P-20947

Registry: Pictou

IN THE ESTATE OF HELEN BAIRD

Application by Grace Whitford for Proof in Solemn Form

DECISION

Judge: The Honourable Justice N. Scaravelli

Final Written Submissions: August 29, 2014, Jill Graham-Scanlan
September 3, 2014, Keith MacKay

Counsel: Keith MacKay, for Grace Whitford
Jill Graham-Scanlan, for Edward Baird and Barbara D'Eon

By the Court:

[1] An application for Proof in Solemn Form was heard over three days in June, 2014. Justice Cindy Bourgeois rendered her written decision in July, 2014. Justice Bourgeois concluded the testatrix had the requisite testamentary capacity and ordered the Will to be admitted to probate. She reserved jurisdiction to deal with costs in the event the parties were unable to agree. The parties were unable to agree on costs.

[2] Justice Bourgeois has been appointed to the Nova Scotia Court of Appeal. Chief Justice Kennedy appointed me to complete the work on this file pursuant to *Civil Procedure Rule* 82.19. The parties have filed written submissions on costs.

BACKGROUND

[3] This was a dispute amongst siblings concerning their mother's Will. Justice Bourgeois provided the following summary.

> **5** Mrs. Baird had executed a Will in November of 2006 in which she appointed her daughters Grace and Margaret as co-Executrices, left bequests of property, and divided the residue of her estate equally amongst her children. She executed two subsequent Codicils.
>
> **6** On November 25, 2011 Mrs. Baird executed a Will in which she appointed her son Edward as Executor of her Estate, left bequests to her children and divided the residue of her Estate equally among her 4 children.

> **7** Edward Baird made an Application for a Grant of Probate on June 10, 2013 in reliance upon the November 2011 Will, with a Grant being issued the same day.
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> **8** On August 13, 2013 Grace Whitford filed a Notice of Application "asking the Court to hear the Will of the said Helen Baird executed on November 25, 2011, proved in solemn form and to determine the validity of the said will, pursuant to subsection 31(1) of the *Probate Act*, S.N.S. 2000, c. 31 as amended". In support of the Application, Grace Whitford filed an affidavit sworn August 12, 2013 in which she asserts the following:
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> > On November 25, 2011, my mother was 90 years old and had been clearly suffering from dementia for at least two years. She did not have the testamentary capacity necessary to execute a Will on that date and, for that reason, the will is not valid.
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> **9** On August 21, 2013 both Edward Baird and Barbara D'Eon filed Notices of Objection to the application brought by Ms. Whitford. In their affidavits in support of the objection they each assert that Helen Baird had testamentary capacity when executing her Will on November 25, 2011, she did not suffer from dementia, nor did she suffer from any medical condition which would affect her testamentary capacity.

POSTION OF THE PARTIES

[4] The respondent estate seeks costs on a solicitor client basis or alternatively a lump sum to be paid by the applicant personally. The respondent submits an order for costs payable by the estate would have the effect of Mr. Baird and Ms. D'Eon paying one half of their own costs as beneficiaries.

[5] The respondent further submits the applicant should bear her own costs. The changes between the two Wills ultimately were not significant other than change of personal representatives. Under these circumstances proceeding with the application was frivolous.

[6] The applicant submits that costs should be awarded to both parties to be taxed on a solicitor client basis, and paid out of the estate. The applicant also submits that the application was not frivolous as the applicant was successful in meeting the burden of proving suspicious circumstances that required the respondent to prove testamentary capacity.

LAW

[7] Both counsel cited the case of *Morash Estate v. Morash* 1997[NSCA] 124 as establishing the general principle on costs.

> [22] … 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 …

[8] The *Probate Act* provides general guidance with respect to costs in contested proceedings.

> **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.

[9] In *Van Kippersluis v. Van Kippersluis Estate* [2011] N.S.J. No. 578, Justice Warner held that the *Morash* principle was no longer valid due to the provision of Section 92 (1) of the *Probate Act*.

> **15** Counsel submits that the approach to costs in proof applications varies. Section 92(1) of the *Probate Act* applies; it authorizes costs against the loser, the estate, or the personal representative. This provision, part of the *Probate Act* enacted in 2000, is subsequent to the Nova Scotia Court of Appeal decision in *Morash*. That is a factual circumstance that makes *Morash* no longer relevant.

[10] In any event Section 92 (1) of the *Probate Act* does not limit the courts discretion to deal with costs pursuant to *Civil Procedure Rules* 77.

[11] *Civil Procedure Rule* 77.02 (1) provides.

> A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

[12] *Civil Procedure Rule* 77.03 provides in part

> (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 in exceptional circumstances recognized by law.

[13] Misconduct of a party has been recognized as an exceptional circumstance meriting an award of solicitor and client costs *MacKay v. Bucher* [2001] N.S.C.A. 171.

ANALYSIS

[14] The respondent submits there was very little difference between the 2000 Will (and subsequent Codicils) and the 2011 Will. In dealing with this issue Justice Bourgeois stated:

> **31** Before moving on, I will pause to address an issue upon which both sides spent considerable effort. The Applicant submits that the changes made in the November 2011 Will, when compared to the 2006 Will with codicils, were significant and as such, should be viewed as constituting a "suspicious" circumstance. The Respondents submit the changes are minor, and should not give rise to any concern.
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> **32** I do not find the changes between the two Wills to be significant. The change of executor, and adjustments made to the bequests of small parcels of land did not, in my view, alter the overriding intent of Mrs. Baird in both instruments to treat all of her surviving children equally. Such a finding however, is very much dependent upon the interpretation of the gift of land contained in both wills to Margaret Anderson. In the 2006 Will, the gift is drafted as follows:
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> > 2(e) To convey to my daughter, Margaret Ann Anderson, a portion of my land located at Caribou Island, in the County of Pictou and Province of Nova Scotia between the existing lot of Robert MacPhee and Mildred MacPhee and the existing lot of Fraser Miller and Susan Miller, for her own use absolutely. I confirm that my daughter, Margaret Ann Anderson shall be responsible for the cost of the survey work and legal work necessary to effect the conveyance of this parcel of land to her.
>
> **33** In the November 2011 Will, Margaret Anderson is to receive land described as follows:
>
> > 3(d) to convey to my daughter, Margaret Ann Anderson, a 1 1/2 acre portion of my land located at Caribou Island, in the County of Pictou and Province of Nova Scotia between the existing lot of Robert MacPhee and Mildred MacPhee and the existing lot of Fraser Miller and Susan Miller, for her own use absolutely. I confirm that my daughter, Margaret Ann Anderson is responsible for the cost of the survey work and legal work required in order to effect the conveyance of these parcels of land to her and also such right of way as is required to access the lot.

> **34** The Applicant and Margaret Anderson assert that Mrs. Baird intended in the 2006 Will to gift to Margaret the remaining portion of her vacant lands at Caribou Island, other than those identified as existing rights of way, consisting of approximately 19 acres. The Respondents say the intent was for Margaret to get a lot big enough to build upon. If I accept the Applicant's interpretation of the earlier provision, such would constitute a significant change in terms of the gift to Margaret. I do not accept that interpretation.
>
> **35** Based upon the evidence of Anne MacDonald, as well as the fact that such a large gift to one child would be contrary to Mrs. Baird's intent to treat her offspring equally, I find that the intended gift of land to Margaret in 2006 and 2011 were not materially different. In particular, Ms. MacDonald testified that the notes she made when taking instructions in 2006 reflected that Mrs. Baird intended Margaret to receive a piece of land suitable for an approved building lot. I accept that such was Mrs. Baird's intent in 2006. The change in the 2011 Will was not a material one, and along with the other changes, fell far short of inciting the suspicion of the Court.

[15] Prior to the hearing of the application the respondent estate made a settlement offer to the applicant that involved conveyance of lands and rights of way, that would have made the appointment of executors the only practical difference between the two Wills. Given these circumstances, the respondent submits that to proceed with a full hearing was frivolous and the estate should not bear her costs.

[16] In her brief on costs, the applicant submits the challenge to the Will was a matter of principle and not gain. Moreover, Justice Bourgeois made findings that suspicious circumstances existed which shifted the burden to the respondent to prove Mrs. Baird had the requisite testamentary capacity. In this regard Justice Bourgeois stated:

27 Here, the Applicant has not merely raised unsubstantiated allegations regarding Mrs. Baird's mental capacity at the time she gave instructions and executed her November 2011 Will. The evidence before the Court was much broader in my view. Although each particular factor may not have been sufficient on its own to give rise to "suspicious circumstances", the Court is satisfied that given a number of concerns, the Applicant has met this initial burden. With respect to concerns surrounding Mrs. Baird's testamentary capacity, the Court notes the following from the evidence:

a) Mrs. Baird was 90 years of age, and had a number of health concerns in the relevant time frame;

b) The Applicant and Mrs. Anderson testified that their mother's mental capacity had been in decline for a number of years prior to the execution of her November 2011 Will, and she in particular, suffered from dementia. Both women gave examples of how their mother's mental capacity had diminished both in terms of memory, insight, and activities of daily living;

c) Solicitor MacDonald, known to Mrs. Baird for a number of years, testified that she didn't seem like herself when she met with her in August of 2011, and needed to be prompted by Barbara D'Eon regarding what changes she wanted made to her Will.

28 With respect to whether Mrs. Baird executed the Will with full knowledge and approval of its contents, of course concerns relating to her mental capacity overlap here, as well as the following considerations:

a) Mrs. Baird was hard of hearing, and only had the opportunity to have the Will read to her by Mr. MacIsaac on November 25, 2011;

b) Mr. MacIsaac had not been provided with the two Codicils executed in relation to her 2006 Will when he used that document as a template for his testamentary discussions with Mrs. Baird.

29 With respect to the existence of concerns regarding undue influence and fraud, the Court has noted the following from the evidence:

a) Mrs. Baird was physically impaired and dependent upon her caregivers;

b) While living with Ms. D'Eon, it was this caregiver who made the arrangements with three lawyers to have Mrs. Baird effect changes to her Will, including the final appointment being in her home;

c) Several family members, including Ms. D'Eon accompanied Mrs. Baird to see Solicitor MacLean in an attempt to have her Will changed;

d) Solicitor MacIsaac had represented Ms. D'Eon in the past, as well as probated the Estate of her common law husband's mother.

[17] One of the purposes of costs is to encourage settlement and deter frivolous actions. Parties are at risk to pay costs if they are unwilling to consider a reasonable settlement offer. In *British Columbia (Minister of Forests) v. Okanagan Indian Band* [2003] 3 S.C.R. 371, Justice LeBell stated:

> 25 As the *Fellowes* and *Skidmore* cases illustrate, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer; . . . Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.

[18] In *Harnum v. Moser* [2007] N.S.J. No. 493, Justice MacLellan awarded solicitor and client costs to the respondent executor payable by the estate but disallowed costs to the applicant for Proof in Solemn Form as there were no suspicious circumstances justifying the application.

[19] *In the Estate of Mary Marjorie Barrieau* [2008] NSSC 162 , despite pre-hearing evidence that the testatrix was not competent to direct and execute a second Will, a nephew of one of the testatrix's children objected to the application for Proof In Solemn Form. Justice Coady found that the respondent was unable to articulate any valid reason for challenging the application in the face of overwhelming medical evidence of her incompetency. He concluded that the objection was frivolous and vexatious and declined to award the

respondent any costs. Justice Coady awarded the applicant solicitor and client costs payable by the estate and costs in the amount of $10,000.00 payable by the respondent personally to the applicant.

[20] In the present case Justice Bourgeois determined that suspicious circumstances existed. In this regard the application cannot be termed frivolous. However, the fact that little turned on the acceptance or rejection of the second Will is relevant. Moreover, the applicant refused to accept an offer that should have satisfied any concerns regarding changes to the Will other than executors. Under these circumstances it would unfair for the estate to absorb the applicant's costs.

[21] Having decided not to award the applicant costs, I am of the view that her conduct falls short of that that would require her to pay costs. As a result the respondent is awarded solicitor and client costs to be taxed and payable by the estate. There will be no award of costs to the applicant, Grace Whitford.

Scaravelli, J.