IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Beairsto v. Stirling, 2007 NSSC 350

Date: 20071123
Docket: SH 278206
Registry: Halifax

Between:

Heather A. Beairsto, Robert Nason
and Stephen Nason

Applicants

v.

Joan M. Stirling

Respondent

DECISION ON COSTS

Judge: The Honourable Justice Kevin Coady

Written Submissions Received: Sept. 13, 2007 & October 9, 2007

Written Decision: November 23, 2007

Counsel: Joey Palov & Katrine Gireoux, for the applicants
Peter Bryson, Q.C. & Sarah Kirby, for the respondent

By the Court:

[1] This was an application pursuant to s. 5 of the **Power of Attorney Act** R.S.N.S. 1989 c.352. The applicants sought an order requiring the respondent to have accounts passed for all transactions involving the exercise of powers of attorney granted to her by her parents. The applicants are the nieces and nephews of the respondent. This application was heard in chambers over two days and on August 15, 2007 the court dismissed the application. The parties are unable to agree on costs and I have received extensive written submissions.

[2] There is no dispute that the respondent, Joan Stirling, is the successful party. She is entitled to a costs award.

[3] The respondent takes the position that she should receive her solicitor client costs from the applicants on a solicitor-client basis. In support she filed a legal account dated September 30, 2004 indicating total time charges of $13,690 plus $2,869.47 in disbursements and HST. She filed a further legal account dated September 10, 2007 indicating total time charges of $47,934 plus $7,948.78 in disbursements and HST. Respondent's counsel submits that he will reduce this latter account to $25,000 plus disbursements and HST.

[4] This application was filed on March 5, 2007. The account dated September 30, 2004 covers legal services from June 4, 2003 until August 30, 2004. While the seeds of this dispute were evident in the detail, most items related to standard estate work and responding to the concerns of the applicants.

[5] The account dated September 12, 2007 covers the period of February 7, 2005 until September 10, 2007. The first item is dated February 7, 2005 and the second item is dated April 3, 2007. It is clear from the detail that much of this account relates to legal services associated with this application.

[6] The respondent advanced an alternative submission stating that she should receive her costs on a solicitor-client basis from the Tonning estate.

[7] The applicants argue that this is not a case that warrants a cost award on a solicitor-client basis. Further, that any award of party-party costs should be limited to $1,500.00. Applicants' counsel takes the position that both parties should be responsible for their own legal expenses and any party-party costs should be recovered from the party instead of the Tonning fund.

[8] I will first address the issue of whether this is an appropriate case for solicitor-client costs. The fact that this is an estate matter involving a trustee is significant. The authorities suggest that in such matters the gratuitous attorney should not bear costs associated with their duties. In most such cases those costs are recovered from the estate. In other rare cases involving litigation these costs can be recoverable from the unsuccessful challenging party.

[9] I accept the respondent's submission that costs recovery on a solicitor-client basis is the general rule for litigation involving trustees. In "Widdifield on Executors and Trustees" stated at 2007-release 3 at page 4-13:

> "The general rule is that, in the absence of misconduct, a trustee should be reimbursed for his costs, charges and expenses out of the trust estate, even in cases of unsuccessful litigation."

[10] In *Thompson v. Lamport*, [1945] S.C.R. 343 the court endorsed this principle at page 356:

> "The general principle is undoubtfully that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of a trust: It is on that footing that the trust is accepted. These include solicitor and client

> costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly."

[11] In Isnor estate, re 2000, CarswellNS 623 (S.C.), LeBlanc, J. offered the following comments at paragraph 17:

> "... It is evident that I should award costs to Ms. Griswold on a solicitor and client basis. She was appointed as the power of attorney by Ms. Isnor. She was placed in a position where she had to respond to the claim being made by Mr. Giffin. She would not gain anything in personal terms from the proceeding except being replaced or confirmed as the Power of Attorney... She has not gained or lost any benefit from the outcome of the application. She had been appointed by Ms. Isnor as the Power of Attorney because of their friendship and because of the trust and comfort Ms. Isnor felt in her care."

[12] The totality of the evidence satisfies me that the respondent was a gratuitous attorney. I found her actions to be genuine and entirely appropriate. Consequently she is entitled to recover her costs on a solicitor-client basis.

[13] I have reviewed the applicants' submissions and authorities with great care. I view these submissions on solicitor-client costs as applicable in the context of conventional non-trustee litigation. In trustee situations there is no requirement for "reprehensible scandalous or outrageous conduct" or behaviour "deserving censure or rebuke" to obtain such an order. In fact it is that type of behaviour on the part of the trustee that could deprive him of solicitor-client costs.

[14] The first account dated September 30, 2004 shall be dealt with in the normal manner given that the services and disbursements predate this application. I accept that the applicants were involved since 2003 and adopted a very hostile position. However, I am satisfied that this account shall be paid from the estate fund. I award Ms. Stirling her costs on this account on a solicitor-client basis. She will receive $13,690.00 for legal fees plus $2,869.47 for disbursements and HST.

[15] I am also awarding solicitor-client costs to Ms. Stirling in respect of the September 10, 2007 account. She will receive $25,000.00 for legal fees, $1,087.10 for disbursements plus HST on both. The critical question is whether this award is paid by the applicants or the estate.

[16] This was a totally unwarranted application. Throughout the applicants have alleged incapacitation without any supportive evidence and in the face of evidence dictating otherwise. This application was dismissed on the issue of incapacitation. I conclude that this application was part of an ongoing campaign to harass Ms. Stirling. While there were some issues with the respondent's record keeping, tax remittances and the $54,000 gift, I find that the applicants over reacted so they

could use these events to legitimize the harassment of their aunt. I cannot conclude that their motivations were otherwise. I am very satisfied that Ms. Stirling did her best through some difficult circumstances and without any support from the applicants family. I am further satisfied that her actions were consistent with her attorney duties.

[17] I find that Ms. Stirling "stepped up to the plate" when her parents needed support. Ms. Stirling was appointed the Tonnings attorney because she lived close by and had longstanding significant contact with her parents. I am satisfied that the Tonning's chose her because they trusted her. Ms. Stirling's efforts were met with criticism and rebuke notwithstanding that she was not receiving any compensation.

[18] In deciding this issue I am assisted by Langdon, J.'s decision in *Fair v. Campbell Estate* 2002, CarswellOnt 5482 (SCJ) and the following remarks which appear at paragraph 5:

> "This case went far beyond legitimate inquiry. Jim's family questioned the good faith and integrity of Margie and Lew[Fair]. Their allegations were separated from allegations of fraud only by the sheerest of curtains. Such affirmative charges ought not to be made lightly or on insufficient evidence. One who makes

> such charges, when they are unsubstantiated, is to be visited with costs to the fullest extent possible."

[19] And further at paragraph's 32-33:

> "Lew made substantial efforts to inform the plaintiffs. Those efforts were necessarily incomplete. Given the plaintiffs' mindsets, I doubt that anyone could either have satisfied or placated them.
>
> I see no reason why Margaret's estate should be required to pay costs. I see every reason why plaintiffs should pay to the estate substantial indemnity costs.

[20] I was struck with the similarities between Fair and this case. Ms. Stirling did make substantial efforts to placate the applicants and I doubt if anything would have satisfied them.

[21] I order that Ms. Stirling's costs arising from the September 10, 2007 shall be paid by the applicants, jointly and severally.

[22] I now will canvass the evidence that I conclude supports my decision.

[23] The applicants set the tone in their December 17, 2003 letters to Ms. Kirby, Ms. Lafferty and the Registrar of Probate. Ms. Stirling was accused of deceit and

of blatantly lying to estate counsel. It was alleged that she made inappropriate use of estate funds and that the use of the Tonnings credit cards was "alarming if not criminal". The evidence did not support any of these accusations. All confusion surrounding the $54,000 gift was corrected when counsel was retained.

[24] These accusations continued in the applicants' affidavits filed in support of this application. Yet Ms. Beairsto acknowledged on cross-examination that throughout the 1990's she did not assist her grandfather with his financial matters or tax preparation. She admitted that she did not have any personal knowledge of the financial management of her grandparents accounts. She further admitted that from 1999-2000 she did not know what sort of decisions or discussions took place between Alice Tonning and Ms. Stirling.

[25] The position of the applicants on incapacity was indefensible. The affidavit of Dr. Curry stated at paragraphs 8-12:

> 8. I saw Mrs. Tonning regularly from the time she moved into Melville Heights until the time of her death in June, 2002. She was able to come to my office for her regular follow-up visits and I felt that she was maintaining herself very well in handling the medical problems that she had been dealt (post CVA, hypertension, arthritis, hip fracture and helping manage her severely incapacitated husband).

9. During my treatment of Mrs. Tonning, I discussed her medical problems and the options available to her, and was satisfied that she understood our conversations and was able to agree to my recommendations regarding her care.

10. On May 6, 2002, she developed acute abdomen. After discussion and consultation with her family, Dr. Carmen Giacomantonio and myself, she decided she would accept the risks of surgery and she had small bowel re-section performed that evening. She had episodes of marked confusion post-operatively. This is not atypical, particularly in elderly people, and not indicative of permanent diminished capacity.

11. By the time Mrs. Tonning left hospital on May 21, 2002, the confusion was fairly adequately resolved.

12. I saw Mrs. Tonning on four occasions at her residence between May 21 and June 20, 2002. She was exhausted from post-surgery. I was able to explain to her the reasons for post-operative exhaustion, which I felt she understood satisfactorily.

[26] The affidavit of Dr. Lea McQuaig stated at paragraph 3:

3. I serve as a lay member of the Psychiatric Facilities Review Board, an independent board consisting of a lay person, lawyer and psychiatrist, which reviews the status of patients being held at one of the Nova Scotia psychiatric units. Patients are held on an involuntary basis when they are deemed to pose a threat to themselves or the public. If a patient is unhappy with their status, they can request a hearing by the Board. We review the patient’s request and decide whether or not their status may be changed. In addition, we often are called upon to decide whether or not the patient is competent enough to make their own decisions regarding treatment. Because of my time on this Board, I have experience assessing the mental competence of an individual.

[27] And further at paragraphs 6-10:

6. At my office on Mrs. Tonning's first visit, Mrs. Stirling filled out the medical history for Mrs. Tonning and signed the form for her, with Mrs. Tonning assisting verbally from a chair. Mrs. Tonning was fully aware of what was being done and participated in the process.

7. On April 4, 2001, I discussed the treatment options with Mrs. Tonning and she independently made the decision as to what treatment choice she would take. She had no problem discussing this matter with me. She understood the conversation and responded intelligently and quickly.

8. While I made the impression of Mrs. Tonning's mouth for the denture, Mrs. Tonning and I carried on a conversation for at least 30 minutes. She was definitely in charge of her situation.

9. Mrs. Tonning and I had another conversation when she returned to pick up her denture on April 19, and when she returned to have the denture adjusted on April 21. Mrs. Stirling paid the bill for Mrs. Tonning, but Mrs. Tonning was aware of the amount that she was being charged and was in agreement that Mrs. Stirling should pay this for her.

10. Mrs. Tonning understood the information that I discussed with her regarding her treatment options, the consequences of the different choices available to her, and made the decision as to what treatment she wanted.

[28] I made the following ruling on August 15, 2007:

"I've considered all of the evidence as well as all oral and written submissions and I conclude that Mrs. Tonning was not legally incapacitated during the period

from after Dr. Tonning's stroke and her death in 2002. I find that while she had many physical health issues, she maintained control of her life. She required assistance obviously but not in any area that would impact incompetence. I find that Ms. Stirling's involvement during the subject period was as an assistant and not as a sole person exercising the authority under the Power of Attorney. My view of the evidence leads me to accept as a fact that Ms. Tonning had sufficient understanding to make or communicate responsible personal decisions and to enter into contract. Ms. Stirling was the close by child who stepped up to the plate when the need was there. I am satisfied that Mrs. Tonning was directing many financial decisions during the subject period."

[29] Ms. Beairsto advanced the following evidence on cross-examination:

"**MS. KIRBY**:My question to you, Ms. Beairsto, is you're not suggesting - you've seen the affidavits of Dr. Curry and Dr. McQuaig, I assume, since last week?

A. I've read through them, yes.

Q. Okay. And you're not suggesting that you can contradict either of their affidavits or that you're qualified to do so regarding your grandmother's capacity?

A. No.

Q. So you're not really in a position to talk to us about - or to give evidence in this application as to your grandmother's capacity, are you?

A. Not in terms of what you're asking me before of legally - legally incapacitated, no. My term - understanding on having been around her, and not just through 1999-2002, but since her stroke in 1990, I did understand some of abilities were diminished. Whether they were considered full and capa - incapacitation - I apologize - no. I - I do know

> she did have some trouble with certain things, yes, from being with her myself."

[30] This evidence satisfies me that the applicants knew that Alice Tonning was competent and that they utilized this argument solely for the purposes of trying to force an accounting. It is of note that the applicants did not file any affidavit evidence supporting their position of incapacity.

[31] The evidence of Ms. Beairsto established that Ms. Stirling was the only person that was in a position, geographically or otherwise, to help the Tonnings in their final years. She testified that this was not something that her family had any objection. She acknowledged that the Tonnings trusted Ms. Stirling and stated that "we have never questioned the devotedness or the time and effort that my aunt, my uncle, my cousins put in while they were here."

[32] In conclusion I am ruling that the applicants are not entitled to indemnity out of the estate for reasons of conduct, conduct that has split this family apart. Their actions did nothing to benefit the estate.

[33] I am not prepared to award any costs to the applicants for the same reasons. In *McDougald Estate v. Gooderham,* 2005 CarswellOnt 2407 (C.A.) the court stated at paragraphs 84-85:

> "In *Gamble v. McCormick* (2002), 4 E.T.R. (3d) 209 (Ont. S.C.J.), Greer J. found that there was no reasonable basis to a husband's challenge to the validity of his late wife's will. At para. 13 of her reasons she states:
>
> The cost of the emotional wreckage caused by this trial to all parties, leaving what had been a warm, loving family unit in tatters, is incalculable. None of their lives will ever be the same again. Costs on a solicitor and client basis cannot heal those wounds. It can only pay for the monetary cost of what took place.
>
> The modern approach to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

[34] In *Jumelle v. Solaway Estate,* 1999 CarswellMan 467 (C.A.) the court stated at paragraph 10:

> "An estate should not be diminished in size because a party pursues a claim without merit. As in other litigation, a party who brings a claim against an estate with no substantial merit will have to pay the costs."

[35] It is the wish of this court that this family can accept this ruling, move on and hopefully, in time, mend the damage done.

J.