IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Harnum v. Moser, 2007 NSSC 351

Date: 20071128
Docket: Probate 772
Registry: Antigonish

IN THE ESTATE OF JAMES ALEXANDER MOSER, DECEASED

Between:

Joan Harnum

Applicant

-and-

James Allen Moser; Brian Moser; Glen Moser; Rolland Moser; Sterling Moser; Sandra DeWolf and Wilma Russell

Respondents

Judge:	The Honourable Justice Douglas L. MacLellan
Heard:	September 10th, 2007, in Pictou, Nova Scotia
Decision:	November 28th, 2007
Counsel:	Ray E. O'Blenis, for the applicant Harry R. G. Munro, QC, for the respondents

By the Court:

[1] This is an application by Joan Harnum for solicitor and client costs against the respondents, James Allen Moser, Brian Moser, Glen Moser, Rolland Moser, Sterling Moser, Sandra DeWolf and Wilma Russell, as a result of their application requesting proof in solemn form of the will of the Late James Alexander Moser. Ms. Harnum is the co-executor of the Estate of Mr. Moser and a major beneficiary under his will.

[2] The respondents also seek their costs on a solicitor and client basis out of the Estate.

[3] The application for proof in solemn form of the will did not proceed to hearing and was dismissed by way of a consent order after discovery of the lawyer who drafted the will and the exchange of medical information about Mr. Moser.

BACKGROUND FACTS

[4] James Alexander Moser died on September 11th, 2005. At the time of his death Mr. Moser was living in a common-law relationship with Joan Harnum.

They had been living together since 1998 initially in Caledonia, Guysborough County, and later from July 2003 until his death in September 2005 in a rented house in Malay Falls, Sheet Harbour in the Halifax Regional Municipality.

[5] In February 2004 Mr. Moser became ill and was taken to the Dartmouth General Hospital in Dartmouth. His daughter, Wilma Russell, one of the respondents, attended there with him along with other family members. After some discussion among the family members it was agreed that Peter DeWolf, spouse of Sandra Acheson, another daughter of Mr. Moser, would contact Tom McInnis, QC, a lawyer and friend of the Moser family, to attend the hospital for the purpose of drafting Mr. Moser's will.

[6] Mr. McInnis did attend the hospital on February 25th, 2004, and took instructions from Mr. Moser. That was done without family members being present in the hospital room. On February 26th, 2004, Mr. McInnis returned to the hospital and arranged for the execution of the will. A patient in the same room signed as a witness along with Mr. McInnis. The family members were present outside of the room and Mr. McInnis came out of the room and handed the will to Joan Harnum.

[7] Mr. Moser remained in hospital for some time and subsequently returned to Malay Falls, Sheet Harbour, where he lived with Joan Harnum until his death in September 2005.

[8] Mr. Moser's will provided that Joan Harnum and his son, James Allen Moser, be appointed co-executors and trustees of his will.

[9] It provided that his home and property at Caledonia where he and Joan Harnum had lived previously containing 100 acres would go to Joan Harnum along with $5,000.00 in his back account, some furnishings and his vehicle provided that she survived him.

[10] It also provided that a 150 acre lot of woodland at Caledonia which he owned would go to his son, Brian Moser.

[11] Mr. Moser also provided a number of specific bequests of personal effects and money to members of his immediate family. He gave $1,000.00 to James

Allen Moser, Sandra DeWolf, Wilma Russell and Glen Moser. Any residue of the estate went to the seven children in equal shares.

[12] The evidence before me is that prior to the will of February 26th, 2004, Mr. Moser had prepared an earlier will dated June 18th, 2003, which was a homemade will using a printed form in which he bequeathed $1,000.00 to Joan Harnum and the residue of his estate to his seven children in equal shares.

[13] The evidence is that the children had some concerns about the validity of this earlier will and that was one of the reasons the family felt that a lawyer should attend at the hospital in February 2004 when it was apparent that Mr. Moser was seriously ill.

[14] Following the execution of the will in February 2004 Mr. Moser arranged to have Tom McInnis, QC, prepare a power of attorney appointing his daughters, Sandra Acheson, and Wilma Russell his attorney. A copy of that document which has been provided to me is not dated. However, it appears it was executed in May 2004 because an affidavit of execution dated May 16th, 2004, has been filed indicating that the witness to that document, one Brenda McInnis, swore the

affidavit on May 16th, 2004, before Tom McInnis, the lawyer who prepared the document.

[15] Following Mr. Moser's death the respondents engaged Harry Munro, QC, to act for them. He wrote Joan Harnum on October 26th, 2005, indicating as follows:

> "We have been consulted by the family of the late Alex Moser with respect to the two Wills enclosed with this letter.
>
> The first Will is dated the 18th of June, 2003 and on its face complies with the formal requirements of the *Wills Act*.
>
> The second Will is dated the 26th of February, 2004 and it too on its face complies with the formal requirements of the *Wills Act*.
>
> Having said that, however, I understand that the failing health of Mr. Moser at the time of making the second Will may require that this Will receive special scrutiny to determine whether Mr. Moser not only had the requisite testamentary capacity but also that he knew and approved of the contents of the Will. The family have pointed out to me that there are numerous spelling mistakes, use of a wrong surname, use of the wrong christian name and a bequest to a non existent grandson. I have suggested to both James Alan Moser, the named joint Trustee and Executor in the second Will and Wilma Russell the named Executor in the first Will that the appropriate way to proceed would be to make an application to the Court of Probate for a "Proof in Solemn Form".
>
> Having said that, given the relatively limited size of the estate, the cost of a Proof in Solemn Form would certainly decrease the amount of assets available for distribution and delay the distribution of assets. Accordingly, I suggested to them that the best solution to the situation would be to come to some type of formal agreement between all of the children of Alex Moser and yourself. Accordingly I

> have the following suggestion for a fair and reasonable settlement. The second Will would be declared invalid with the consent of all parties named in it. The first Will would be proven in Common Form and the children of Alex Moser would agree to you receiving the sum of $5,000.00 (which includes the sum of $3,500.00 which you withdrew from a joint account on September 12th, 2005 and any other amounts which you have already received), the Buick Century owned by the deceased, and the items of furniture more particularly described in the list attached to this letter. All other items owned by the deceased would remain in the house and the family would ask that the key to the fire-safety box be returned.
>
> ...
>
> In exchange the family would take the home and 110 acres and the woodlot of 170 acres. They would also assume full responsibility for the income taxes payable including those payable on the deemed capital gain triggered by the late Mr. Moser's death, his funeral expenses and any other debts outstanding at the time of his death."

[16] At that point Joan Harnum engaged Ray O'Blenis, QC, to act for her and on her behalf he rejected the suggested process set out in Mr. Munro's letter.

[17] The lawyers continued to discuss the situation and in January 2006 Mr. Munro made a formal application to the Court requesting that Mr. Moser's will be proven in solemn form.

[18] Counsel for both parties also became involved in a formal discovery of Mr. Tom McInnis, QC, and a number of conference calls with the Court.

[19] Following the discovery of Mr. McInnis, which basically established that he had no issue about the testamentary capacity of Mr. Moser when he took instructions and prepared the will, Mr. Munro on behalf of the respondents requested that Mr. O'Blenis get a medical report from the doctors treating Mr. Moser at the Dartmouth Hospital in February 2004. That was done and after some delay an Order was consented to dismissing the application for proof in solemn form.

[20] The parties could not agree on the issue of costs and therefore a hearing was held on September 10th, 2007, following receipt of briefs from both sides.

[21] At the costs hearing the respondents asked for solicitor and client costs of $13,192.40 to be paid out of the estate.

[22] Joan Harnum asked for solicitor and client costs of $18,000.00 to be paid by the respondents.

THE LAW

[23] **Civil Procedure Rule 63.12** provides:

> "(1) Where a person is a party in the capacity of trustee, personal representative or mortgagee, he shall, unless the court otherwise orders, be entitled to costs, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative, or out of the mortgaged property.
>
> (2) Where a trustee, executor, administrator or mortgagee,
>
> (a) has acted unreasonably;
>
> (b) has acted for his own benefit rather than in his representative capacity;
>
> © has participated in a proceeding unnecessarily because his interest is small, remote or sufficiently protected by any other interested party;
>
> the court may order the costs under paragraph (1) not to be paid out of the fund or mortgaged property."

[24] In ***Morash Estate v. Morash***, [1997] N.S.J. No. 403, Freeman J.A. of the Nova Scotia Court of Appeal dealt with an appeal from a trial decision in which the Court awarded costs to the party claiming that the testator there lacked testamentary capacity despite a finding that the testator had testamentary capacity. He said at paragraph 22:

> "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 and I am not satisfied that there is a basis for interfering with the cost award in the present matter. Both the appeal and the cross appeal are dismissed without costs, provided, however, that the respondent's solicitor and client costs on the appeal and cross appeal shall be paid from the estate."

[25] Counsel for the respondent indicates in his pre-hearing brief as follows:

> "Costs in Estate litigation are awarded in a different manner than costs in general litigation. It is recognized that there is a public interest in having a will proved in solemn form. Traditionally, opponents of wills who have been unsuccessful, and have acted in good faith, have been relieved from paying costs associated with the action. MacDonnell, Sheard & Hull, *Probate Practice* (1981) 3rd ed. at p. 411, states: *'A party entitled in distribution, who merely puts the executors to proof in solemn form, if he has reasonable ground for doing so will generally be allowed his costs out of the estate'."*

[26] Counsel for the applicant basically agrees with that principle, however, he argues that in this case the request for proof in solemn form was not based on a reasonable ground.

[27] In ***Winters Estate (Re)***, 180 N.S.R. (2d) 388, Hall J. of this Court said at paragraph 21:

> "In this case I have concluded that the executor acted unreasonably and improperly in rejecting the claimant's claim and placing it before the Court for adjudication. In my opinion, as I stated previously, the evidence supporting Mrs. Winters' contention that the money in question belonged to her was so strong and overwhelming that there should have been no question in the minds of the executor's responsible officials as to her entitlement. In failing to recognize this reality and taking the action that it did I find that the executor acted unreasonably and not in the best interests of the Estate. On the other hand, if the residual beneficiary had indicated strong opposition to the executor taking such a step, my view of the executor's action may have been different. I doubt very much, however, if all the facts had been placed before the residual beneficiary that it would have opposed the claim. It should be noted, as well, that a party who forces an estate to engage in unnecessary litigation may be required to pay the costs of the proceeding if the decision goes against the party. Accordingly, I will order that the executor's costs not be paid out of the Estate."

[28] Section 92 of the ***Probate Act of Nova Scotia*** provides as follows:

> "**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."

POSITIONS OF THE PARTIES

[29] Counsel for the respondents argues that his application on their behalf to have Mr. Moser's will proved in solemn form was reasonable at the time it was made because a number of them felt that Mr. Moser was very ill when he made his will and also because there were mistakes in the will which they suggest showed that he was confused.

[30] The application filed by the respondent requesting proof in solemn form indicated the basis for the request based on the following mistakes in the will:

> "(a) Paragraph 11 – *James Allen* Moser - the correct name is Alan James Moser;

(b) Joan *Harnun* should be spelt Harnum (throughout the Will the surname *Harnun* which should be spelt Harnum is mis-spelt four (4) times);

© Paragraph 4 – Brian *Mosher* should be spelt Moser;

(d) Paragraph 8 – *Rolland* Moser should be spelt Roland;

(e) Paragraph 10 – James *Allen* Moser should be spelt Alan;

(f) Paragraph 11 – Sandra *DeWolfe* has been given the wrong last name, it should be Acheson;

(g) Paragraph 13 – *Glen* Moser should be spelt Glenn;

(h) Paragraph 17 – *Stephanie* - is not the daughter of Roland, she is the daughter of Sterling;

(I) Paragraph 17 – once again *Rolland* Moser should be spelt Roland;

(j) Paragraph 18 – Sterling Moser does not have any sons;

(k) Paragraph 19 – once again Sandra *DeWolfe* has again been given the wrong surname."

[31] The application filed by the respondents also indicated:

> "At the time of making his Last Will and Testament, based on our general information of our father's health, we believe that he was under the influence of medication, and unable to fully comprehend and understand the complexities of the document which he signed. Your deponent Wilma Russell was also informed by the Testator that he could not hear what Thomas McInnis was saying."

[32] Mr. Munro also argues that his clients could not get medical information about Mr. Moser's condition at the time he made this will from his doctors because of the confidentiality issue.

[33] Finally, he argues that once the discovery of Mr. McInnis was done and the medical information was provided his clients agreed to dismiss the application for proof in solemn form.

[34] Mr. O'Blenis on behalf of the applicant argues that (pre-trial brief pp. 49-50):

> "4) The facts regarding the late Mr. Moser's mental capacity on February 25, and February 26, 2004, and right up to the time of his death on September 11, 2005, were so 'overwhelmingly and beyond any doubt, known to the Respondents in February, 2004, or at the very latest, fairly soon after their father died. In the face of that knowledge the Respondents proceeded with their application resulting in substantial costs to the estate. It is respectfully submitted the Respondents acted unreasonable in bring the application and their costs should therefore be paid from their own resources, so to the costs incurred by the estate.

5) It is respectfully submitted the actions of the Respondents were ‘reprehensible, and outrageous’, knowing full well their father’s mental capacity and condition on February 25th, and 26th, 2004, which were no different than when the Power of Attorney was signed on April 19, 2004, which condition is supported by the sworn evidence of Thomas McInnis, Q.C.

6) In the present case, there were absolutely no suspicious circumstances surrounding the taking of instructions and signing of the Will dated February 26, 2004. The facts here were that it was Sandra Acheson, one of the children of the late James Alexander Moser who arranged for Thomas McInnis, Q.C., to go to the hospital to take instructions for the Will, and it was Wilma Russell who told Joan Harnum she could not go into the hospital room because the lawyer was taking instructions for Mr. Moser’s Will. Neither they, nor any other family member on February 26, 2004, questioned the circumstances surrounding the making of this Will on February 25th, or 26th, 2004, and they all acknowledged and approved of the making of the Will.

7) It is respectfully submitted, Respondents did not act prudently and properly or reasonably in proceeding with their Application in Proof of Solemn Form. In these circumstances, the estate should not bear their costs paid to their solicitor and they should be responsible for the costs the co-executor on behalf of the estate incurred in exercising her duties as a named co-executor and personal representative of the estate.”

[35] During the course of the hearing on costs Mr. O’Blenis conceded that his request for solicitor and clients costs against the respondents would not meet the high threshold for solicitor and clients costs generally and that, therefore, he was asking the Court to award party and party costs against the respondents.

[36] Mr. O’Blenis also argues that the Court should consider the practical result of an award of costs here because of the small value of the estate.

[37] The information before me is that the property given to Joan Harnum has a value of about $45,000.00 and the woodlot granted to Brian Moser has a value of about $35,000.00.

[38] Mr. O’Blenis argues that it is basically the applicant who will suffer if an award of costs is made against the estate or the estate is responsible to cover on a solicitor and client basis his costs for defending the application.

FINDINGS

[39] Based on the facts of this case I conclude that it is not appropriate that the respondents get costs either on a solicitor and client basis or a party and party basis. The allegations that there were spelling mistakes in the will are I find frivolous matters which could easily have been explained. They certainly did not go to testamentary capacity.

[40] The suggestion that Mr. Moser was on medication and gravely ill when he prepared his will is also not well founded. Obviously, he was ill. It was Sandra Acheson, his daughter, who arranged for a lawyer to come to make his will. She must have felt that he had capacity to do so based on what she knew and observed about his condition at that time. I am not prepared to equate being in pain with a heart problem to not having testamentary capacity.

[41] Counsel for the respondents argues that suspicious circumstances are enough to justify an application for proof in solemn form and that such circumstances existed in this case.

[42] While I agree that suspicious circumstances can trigger such an application; however, I do not conclude that there existed such circumstances here.

[43] Counsel for the respondents argues that the change in Mr. Moser's will from the one made in June 2003, some eight months earlier, should be considered as going to the issue of suspicious circumstances. I reject that argument. Mr. Moser's will of February 2004 was a clearly reasonable distribution of his estate considering the fact that he had at that point lived with Joan Harnum for a number

of years. He basically divided his estate with one half going to her and the other half going to his children or his grandchildren.

[44] The applicant takes the position that because the estate was forced to in effect defend the application for proof in solemn form that it should be awarded costs on a party and party basis.

[45] Mr. O'Blenis on behalf of the applicant suggests that two cases decided by Hall J. of this Court support his position. In ***Winters Estate (Re)***, [1999] N.S.J. No. 456, Justice Hall denied an executor costs out of the estate when he found that the claimant against the estate was awarded costs on a solicitor and client basis after the Court approved her claim and the executor who defended the claim was denied costs out of the estate. He said at paragraph 21:

> "In this case I have concluded that the executor acted unreasonably and improperly in rejecting the claimant's claim and placing it before the Court for adjudication. In my opinion, as I stated previously, the evidence supporting Mrs. Winters' contention that the money in question belonged to her was so strong and overwhelming that there should have been no question in the minds of the executor's responsible officials as to her entitlement. In failing to recognize this reality and taking the action that it did I find that the executor acted unreasonably and not in the best interests of the Estate. On the other hand, if the residual beneficiary had indicated strong opposition to the executor taking such a step, my view of the executor's action may have been different. I doubt very much, however, if all the facts had been placed before the residual beneficiary that it

> would have opposed the claim. It should be noted, as well, that a party who forces an estate to engage in unnecessary litigation may be required to pay the costs of the proceeding if the decision goes against the party. Accordingly, I will order that the executor's costs not be paid out of the Estate."

[46] In ***Thorsen Estate v. Thorsen***, [2002] N.S.J. No. 185, Hall J. dealt with a situation where an executor on behalf of an estate was unsuccessful in a claim against a beneficiary. He said at paragraphs 10 and 11:

> "**10** The guiding principle as to the awarding of costs is as stated by Hart, J.A., in Bent v. N.S. Farm Loan Board, (1978) 30 N.S.R. (2d) 552, where he said at pages 556 - 557:
>
> > Under the Civil Procedure Rules of this province the costs of a proceeding shall follow the event unless the Court otherwise orders, and those costs are always in the discretion of the Court. See rule 63.02-03.
> >
> > The discretion of the Court must, however, be exercised judicially. This principle was enunciated very clearly by Lord Goddard in Lewis v. Haverfordwest Rural District Council, [1953] 2 All E.R. 1599, in a case in which the arbitrator had refused costs to the parties because they had not attempted to negotiate a settlement. At p. 1599 he said:
> >
> > > It is a curious circumstance that lay arbitrators always seem to think parties should pay their own costs. Perhaps this case and that which has recently been before Devlin, J., Smeaton Hanscomb & Co.,d Ltd. v. Sasson T. Setty, Son & Co. (No. 2), ante, p. 1588, may be of some use in emphasizing to lay arbitrators that it has been laid down in the House of Lords, re-affirming the Court of Appeal, in Donald Campbell & Co. v. Pollak, [1927] A.C. 732, that there is a settled practice of the courts that, in the absence of special circumstances, a successful litigant should receive his costs, and that it is necessary to show some grounds for refusing an

> order which would give them to him. The discretion to refuse that order must be judicially exercised. Those words 'judicially exercised' are somewhat difficult to apply, but they mean that the arbitrator must not act capriciously and must, if he exercises his discretion to refuse the usual order, show a reason connected with the case which the court can see is proper.
>
> **11** The position is somewhat different when an estate is a party to the proceeding. Generally, in such cases, the executor of the estate is awarded costs on a solicitor and client basis and the other parties are awarded costs on a party and party basis, all being paid out of the estate or fund that is the subject of the proceeding. See Winters Estate, 180 N.S.R. (2d) 388 at page 390."

[47] He therefore concluded:

> "**19** Considering all the circumstances I have come to the conclusion that the conduct of the testatrix and the defendant collectively were mainly responsible for the suspicions arising and the confusion as to the true intentions of the testatrix respecting the disposition of her property. Accordingly, I am of the view that this constitutes special circumstances and that the estate, in reality the other three sons, should not be saddled with costs in this proceeding, that is, not only that it should not have to pay costs to the defendant but to recover its costs on a party and party basis from the fund."

See also ***Marshall Estate (Re)***, [1998] O.J. No. 258 and ***Olenchuk Estate (Re)***, [1991] O.J. No. 2624.

[48] In this case the value of the estate is approaching $100,000.00 in total. The matter did not proceed to hearing and therefore party and party costs would be

under Tariff F being a situation where the matter was discontinued and would amount to $5,000.00.

[49] In the circumstances of this case and considering the fact that the respondents did not insist on an actual hearing I conclude it would not be appropriate to award costs against the respondents.

[50] In summary, therefore, the estate will be responsible for the solicitor and client costs of Mr. O'Blenis in dealing with the application for proof in solemn form. There was some discussion with counsel about whether Mr. O'Blenis did some work for Ms. Harnum which was not related to the respondents' application and I agree that any such fees for that work should not be included in Mr. O'Blenis's bill. He will of course be entitled to costs of the costs hearing.

J.