**IN THE COURT OF PROBATE FOR NOVA SCOTIA**
**Citation:** Barrieau Estate (Re), 2008 NSSC 162

**Date:** 20080528
**Docket:** 55009
**Registry:** Halifax

In the Estate of Mary Marjorie Barrieau

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**DECISION ON COSTS**

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| **Judge:** | The Honourable Justice Kevin Coady |
| **Written Submissions on costs:** | April 4, 2008 for the applicant<br>April 9, 2008 for the respondent |
| **Decision:** | May 28 , 2008 |
| **Counsel:** | Alex Benitah, rep applicant James Barrieau Jr.<br>Darren Morgan, rep respondent Kendrick Hull |

**By the Court**:

[1] This application for Proof of Will in Solemn Form was heard over four days in March, 2008. An oral decision was delivered in favour of the applicant on March 28, 2008. The court invited written briefs on costs.

[2] A short review of the facts is helpful notwithstanding my decision on the merits. Mary Marjorie Barrieau died on November 6, 2005. She was predeceased by her spouse and only daughter. She was survived by her only son, the applicant James R. Barieau Jr. She was also survived by six grandchildren including the respondent, Kendrick Lewis Hull Jr.

[3] Ms. Barrieau died with two Wills, one in 1994 and the other in 2004. In her 1994 Will Mr. Barrieau was named the residual beneficiary, executor and trustee. Under the terms of the 1994 Will each of the six grandchildren were to receive $1,000.00

[4] Mr. Barrieau was not a beneficiary under the 2004 Will. Under that Will the six grandchildren were the residual beneficiaries. The named executor was Mr.

Barrieau's ex-spouse, Cathy Hatch. In 2006 Ms. Hatch renounced her position as executrix of the 2004 Will.

[5] It is very apparent that the 2004 Will drastically altered Ms. Barrieau's wishes. Investigations by Mr. Barrieau brought his mothers 2004 testamentary capacity into question. On the basis of his relationship with his mother, and his inquiries, Mr. Barrieau made application to proof the 1994 Will.

[6] Mr. Barrieau took steps to determine the position of the six grandchildren prior to commencing this application. He disclosed his position and the evidence he felt supported that position. He provided relevant medical evidence as well of the notes of the lawyer who prepared the 1994 Will. He forwarded an affidavit from his mothers' physician which clearly stated that she was not competent to direct and execute the 2004 Will. In time he provided the grandchildren with a formal medical report confirming the same conclusions.

[7] Mr. Barrieau's four children did not contest this application. His nephew Derrick Hull did not contest this application. Kendrick Hull Jr. made the only objection.

[8] The applicant herein was entirely successful and the respondent entirely unsuccessful. This matter should never have gone to trial. The respondent was unable to articulate a reason for challenging this application that was more than a personal view. It was very clear to me that Mr. Hull gave this application little consideration before taking a position. The evidence supporting his position was negligible. The evidence opposing his position was overwhelming. The hearing did not disclose any evidence that was not available well in advance of the hearing.

[9] The affidavit of Dr. Howard Conter dated July 31, 2006 disclosed that he was Ms. Barrieau's physician from 1990 until 2005. It disclosed that he was very experienced in treating alzheimer's disease and dementia. It was Dr. Conters opinion that "by September, 2004 Mary Barrieau's dementia had progressed to a stage that she was of unsound mind, constantly paranoid, and easily influenced as a result". He continued by stating "Mary Barrieau did not have the capacity to execute a Will on September 16, 2004 as she was incapable of understanding what she was doing and unable to appreciate the extent of her property or appreciate the persons who might have claims to her estate."

[10] Mr. Hull was unable to challenge these conclusions either by cross-examination or by calling evidence.

[11] The March 5, 2008 affidavit of Dr. Howard Conter enclosed a January 28, 2008 medical report and his medical chart notes, both respecting Ms. Barrieau. In his report he confirmed that in September, 2004 she was suffering from dementia and paranoia. He stated that at the time of the second Will "I would find it very difficult to believe that Mary would be able to comprehend and recall what properties she owned and in what capacity."

[12] Also attached to the March 5, 2008 affidavit was a November 12, 2003 report by Dr. Janet Gordon who conducted an ambulatory care consultation on Ms. Barrieau. The following conclusions appear at page 3 of that report:

> On the MMSE, she scored 27/30. She lost one point for the year, believing it was 1923. She could not name the country and got the floor wrong. Recall was 3/3, however, although she could give me her address and phone number, she could not name all of her son's children and, in fact, believed he had three when in fact he has four. She was able to spell world backwards, but could not do months of the year backwards and could not subtract 4 from 40. Verbal fluency was decreased at 11 and 6, when naming animals she perseverated back to F words. Clock drawing was normal.

[13] Dr. Gordon concluded that Ms. Barrieau presented with impaired short term memory and attention concentration.

[14] The respondent, Mr. Hull, had access to all of this information before the hearing but was unable to challenge it with evidence.

[15] Mr. Hull's evidence was that he did not find that Ms. Barrieau was so affected in spite of his regular contacts with her. I am satisfied that Ms. Barrieau's behaviour deteriorated significantly between 2002 and 2004 and one would have to be in denial to not have noticed. I am satisfied that Mr. Hull was aware of Ms. Barrieau's deterioration as it occurred. Yet, he forged ahead in search of financial gain.

[16] The law of costs in probate matters is canvassed in the applicant's legal memorandum. I will not repeat it all here but I am guided by the following two cites:

Rule 63.12(1) of the **Nova Scotia Civil Procedure Rules** provides:

> 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, insofar 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.

In Nova Scotia the general principle regarding costs is found *Morash Estate* v. *Morash*, [1997] N.S.J. No. 403 (N.S.C.A.). at para. 22 Freeman J. A. noted:

> 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. Costs are discretionary with the trial judge [...].

[17] Mr. Barrieau seeks his costs from the estate in the amount of $38,856.9. Given that he is the residual beneficiary of the 1994 Will, this amount still will come out of his pocket. I have reviewed counsels "activity report" and find that, while quite high, it is reasonable in the circumstances. I therefore award Mr. Barrieau his costs on a solicitor client basis in the amount of $38,856.91 payable by the estate.

[18] Mr. Barrieau seeks party and party costs from Mr. Hull personally in the amount of $17,500 which would reduce the solicitor client costs to be taken from the estate. Mr. Hull seeks costs on a party and party basis out of the estate of Ms.

Barrieauu in accordance with “Tariff A” of the **Civil Procedure Rules**. In the alternative he requests that there be no award of party and party costs against him and in favour of Mr. Barrieau.

[19] I am firmly of the view that Mr. Hull’s objection was frivolous and vexatious. On the basis of this conclusion, it would be inappropriate to allow him to pay his costs out of the estate. Mr. Hull will not be awarded any costs.

[20] I have given a great deal of consideration as to whether Mr. Barrieau should have a costs award against Mr. Hull. I recognize that the estate/Mr. Barrieau is financially worse-off as a result of Mr. Hull’s unwarranted and unsupported objection to the 1994 Will. I am also aware of Mr. Hull’s general financial state of affairs at the time of the trial. I expect that a costs award in any amount will be a great burden to Mr. Hull. Yet he must be held accountable for causing this litigation and the damage to his extended family. Costs are discretionary but must be exercised judicially. I award costs against Mr. Hull personally, in favour of Mr. Barrieau in the amount of $10,000.

J.