

SUPREME COURT OF NOVA SCOTIA
Citation: Fraser Estate (Re), 2010 NSSC 36

Date: 20100129
Docket: Pic No. 299458
Registry: Pictou

In the Matter of:

The Estate of Anna A. Fraser, Deceased

AND

In the Matter of:

An Application by Susan MacDonald and George Fraser to Adjudicate their
claims against the Estate of Anna A. Fraser

Applicants

AND

In the Matter of:

John Haywood Fraser

Respondent

DECISION ON COSTS

Judge: The Honourable Justice Kevin Coady

Written Submissions: November 4th and December 11th, 2009

Decision: January 29, 2010

Counsel: David Wallace, QC & Joyce Diamond, for the applicants
M. Anne Levangie & Elizabeth A. Newton, for the
respondent

By the Court:

[1] This application for costs follows this court's decision at 2009 NSSC 296.

There is no question but that the Applicants were substantially successful at trial.

[2] The Applicants and the Respondent are the adult children of Anna Fraser who died on April 19, 2008 at the age of 90 years. In a Codicil to her Last Will and Testament she directed as follows:

That all of my children who have provided for preparing and renovating my house for my home care, and/or have contributed financially to my continuing home care, shall be reimbursed in full from my estate after payment of my just debts, funeral and testamentary expenses before any other bequests are paid, and the funds are to be disbursed to those children in full or on a pro-rated basis if there is not sufficient funds to reimburse them;

[3] The Applicants contributed substantial sums (\$148,000) toward their mother's care in the years preceding her death. The Respondent objected to a portion of those expenditures being repaid from the mothers estate. This court approved all of the Applicants accounts.

[4] Additionally the Respondent filed a Notice of Claim against the estate in the amount of \$3,443.00. This court approved those expenditures.

[5] The Applicants argue for an increased costs award. They submit that the “amount involved” should be set at \$50,000.00 to reflect their recovery. They further submit that scale II of Tariff A is the appropriate scale and it allows for a basic award of \$7,250.00. They also seek an added award of \$2,000.00 for each trial day which brings their claim to \$11,250.00. The Applicants further argue that a rejected favourable settlement offer opens the door to increase this award by 60%.

[6] The Respondent argues that there should not be a costs award or, in the alternative, all parties costs be paid from the estate.

[7] The position of the Applicants respecting costs is substantially driven by a settlement offer they made to the Respondent on April 6, 2009. The following represents that offer:

- (I) Susan would reduce her claim for executor’s compensation by \$8278.00 to \$10,000.00;
- (ii) George and Susan would reduce their claim as creditors by \$16,000.00 to \$135,396.91.

These concessions by George and Susan are conditional upon the following:

- (I) John reduces his claim as creditor by \$2100.00 to \$1333.00;
- (ii) John withdraws his objection to George and Susan's accounts as creditors;
- (iii) John and the other residual beneficiaries (Nancy and Patsy) agree to consent to the accounts of Susan as personal representative and agree to allow the closing of the estate to proceed on an uncontested basis without a hearing.

[8] On April 14, 2009 counsel for John Fraser responded to the offer as follows:

Thank you for your letter of April 6, 2009. I have had the opportunity to discuss your settlement offer with my client. Unfortunately the terms of the settlement are not acceptable to him. I will be seeking a date from the Court to set the matter down for a hearing. Please let me know if there are dates for which you are unavailable for the hearing.

[9] John Fraser did not make a counter-offer. I accept that the Applicant's offer was \$16,000.00 more favourable to the Applicants than the trial decision.

[10] *Civil Procedure Rule 77* addresses the issue of costs. Rule 77.02 establishes that the court has a general discretion when assessing party and party costs:

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.

(2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

[11] This discretion is broad and unfettered and has as its goal doing justice between the parties. It is my view that this Court can exercise this discretion without giving principled reasons. It is also my view that if there is a favourable offer to settle, then this discretion has to be exercised on principles rather than anything arbitrary.

[12] *Civil Procedure Rule 77.07* has application given that the Applicants are seeking costs above the tariff: This rule states as follows:

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;

[13] Subsection 77.02(2)(b) establishes that the presence of an unaccepted settlement offer establishes a presumption in favour of an increased costs award.

[14] I am satisfied that the following principles emerge from the rules and the caselaw:

- Costs are in the discretion of the court.
- A successful party is generally entitled to a cost award.
- A decision not to award costs must be for a very good reason and be based on principle.
- The amount of a party and party cost award should represent a substantial contribution towards the parties reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity.
- The tariff of costs and fees is the first guide used by the court in determining the appropriate quantum of the cost award.

·A formal offer to settle that is rejected allows the court to double a portion of the tariff, proportional to the amount of fees incurred between the date of the offer and the date of the hearing.

·The doubling provisions of the old Rule 41A may not be applicable to new Rule 77.07. Yet the court has the discretion to increase tariff costs to take into consideration a written offer of settlement that is not accepted.

·The purpose of costs awards is to encourage settlement and to discourage unnecessary steps in the litigation process.

[15] I accept that the circumstances of this action create a presumption in favour of a costs award. However, because of the following circumstances, I chose not to make an order and both parties will shoulder their own costs.

·While this may be an estate matter, it has been driven by a family dynamic based on emotion. All parties contributed to this situation

but I am satisfied that the Applicants caused it by intentionally isolating the Respondent from discussions about their mothers care and estate.

·The parties are all accomplished and successful business people who have achieved a high level of prosperity. A no costs order will have minimal financial impact whereas a costs order will have significant personal impact. A costs order would be further salt in the families wounds and would be counter to any future reconciliation.

·The Applicant's clandestine management of their mother's affairs created an aura of suspicion in the Respondent and other family members. It is not surprising that a Notice of Objection would be filed given the Applicants failure to keep the other siblings in the loop.

·Throughout the litigation process the Respondent amended his position when provided with verification of certain expenditures.

·Given the size of Anna Fraser's estate, the Applicants received a windfall as a result of the bequest of "my cottage and two lots situate on the water at Chance Harbour, Pictou County, Nova Scotia." This was a family jewel that was enjoyed by all family members for years. While the financial value of this property is debatable, the emotional value is not.

·The Respondent was successful on the Notice of Objection that he advanced at the hearing.

·The Respondent Susan MacDonald will receive a substantial executor's commission on top of her inheritance. I have not received submissions that she would be prepared to forego this commission in favour of the residual beneficiaries.

[16] Cost awards are meant to act as a deterrent. In these kinds of cases it is my view the deterrent effect is substantially lessened.

[17] Orkin in *The Law of Costs* (2ed) 2009 discusses discretion in costs applications at page 2-59:

As noted above, a successful party has no legal right to costs but only a reasonable expectation of receiving them, subject to the court's discretion in that regard. It has been said that costs should follow the result; and only in a rare case should a successful party be deprived of costs. However, the court has an inherent jurisdiction with respect to costs, including the discretion to refuse or limit the amount of costs recoverable from an unsuccessful party. The discretion must be exercised only if the interests of justice require it, and then only for very good reason. As a general rule, a successful party may expect to receive an award of costs and, as a corollary, should not expect to be ordered to pay the costs of an unsuccessful party.

[18] And further at page 2-61:

The discretion of the court to deprive a successful litigant of his or her costs is a discretion which must be exercised judicially and upon proper material connected with the case, or having relation to the subject-matter of the action. In exercising this discretion the judge may consider the conduct of the party not merely during the course of the litigation but also prior to and leading up to or contributing to it. As Jessel M.R., pointed out in *Cooper v. Whittingham*.

There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs . . .

The discretion of the trial judge to exempt an unsuccessful party from the payment of costs is unfettered provided that it is exercised judicially, and an appellate court is not entitled to substitute its own discretion and will not interfere where there was a sound basis for exercising the discretion.

[19] This is one of those rare cases that calls for the exercise of discretion against an award of costs to a successful litigant.

J.