SUPREME COURT OF NOVA SCOTIA

Citation: *Wamboldt v. Wamboldt Estate*, 2010 NSSC 228

Date: 20100611
Docket: Hfx No. 310112
Probate Court No. 54475
Registry: Halifax

Between:

Randy J. Wamboldt

Applicant

v.

Estate of Harry Gordon Wamboldt

Respondent

Judge: The Honourable Justice M. Heather Robertson

Written Submissions: April 16, 20 and 23, 2010

Decision: June 11, 2010 **(COSTS)**

Counsel: Allen C. Fownes, for the applicant
John T. Shanks, for the respondent

Robertson, J.:

[1] By a decision of mine dated March 4, 2010, I found that a Will dated August 12, 2000, executed by Harry Gordon Wamboldt, was not prepared with the full knowledge and approval of the testator or that he was fully aware of its contents when he executed the Will.

[2] The court ordered that the deceased's earlier Will dated October 15, 1996, be admitted into probate, as the valid Will of the testator Harry Gordon Wamboldt.

[3] I have received submissions as to costs from counsel for Mr. Randy Wamboldt, who moved for proof in solemn form of his father's Will. I have also received submissions from Mr. John Shanks, on behalf of Susan Wamboldt, the respondent.

[4] Mr. Randy Wamboldt seeks his costs in the lump sum of $40,000.00 inclusive of disbursements plus HST. He asks the court to assess these costs against his sister Susan Wamboldt personally, charged against her share of the estate. He also requests that she be denied the recovery of any costs from the estate in this matter.

[5] Costs in this estate action are governed by the 1972 *Civil Procedure Rules, Rule* 63.12. Those provisions are not set out in the new *Civil Procedure Rules*, which now reflect broad principles on the award of costs. The relevant *Rules* are as follows:

> 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.
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> > (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.
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> 77.03 (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.

(3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

. . .

77.06 (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

. . .

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;

(c) an offer of contribution;

(d) a payment into court;

(e) conduct of a party affecting the speed or expense of the proceeding;

(f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;

(g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;

(h) a failure to admit something that should have been admitted.

> (3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

[6] Counsel for Susan Wamboldt rely on *Re Ramsay Estate*, 2004 NSSC 162, wherein Justice Wright awarded the executor, who successfully defended the Will, costs on a solicitor/client basis. He also awarded the unsuccessful parties their costs on a party and party basis.

[7] Justice Wright commented on the "general rule" on the treatment of costs in estate litigation at para. 5 of his decision:

> [5] The treatment of costs in estate litigation such as this was recently affirmed by the Nova Scotia Court of Appeal in *Morash Estate v. Morash* [1997] N.S.R. (2d) Uned. 107. Justice Freeman summed it up as follows:
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> > 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...
>
> [6] I am not persuaded that there should be any departure from the above described general practice in the treatment of costs in this case, either for the executor or the opponents of the Will. Mr. Ramsay as executor has successfully defended the validity of the Will and ought to recover his costs on a solicitor and client basis to be paid from the estate.
>
> [7] The requirement for proof in solemn form initiated by the opponents, on the other hand, cannot be said to have been frivolous where suspicious circumstances were found to have been raised on the issue of testamentary capacity and knowledge and approval of the contents of the Will. Although the opponents were unable to establish undue influence, Mr. Ramsay further aroused the suspicion of his sisters which lead to this litigation by his non-communication with them about their mother's affairs and the manner in which he handled their mother's money both before and immediately after her death (all of which is

> detailed in the main decision). Accordingly, I find that the opponents ought to recover from the estate their costs on a party and party basis.
>
> [8] To that end, the amount involved under Tariff A pursuant to Civil Procedure Rule 63 ought to be fixed at $90,000 representing the approximate amount that the opponents would have been entitled to, had their challenge to the Will been successful. I further direct that the basic Scale 3 be applied which produces a party and party costs figure of $6,875. In addition, the opponents shall be entitled to recover their taxable disbursements permitted by law.

[8] In *Re Murray Estate*, 2000 CanLII 5316 (NSSC), Justice Goodfellow, relying on *Veinot v. Veinot Estate et al*, 1998 CanLII 4543 (NSSC) 1998, 167 N.S.R. (2d) 101 at p. 106, awarded costs from the estate on a solicitor/client basis to the proctor of the estate and then awarded party and party costs from the estate to the parties challenging the will, in the absence of unusual or exceptional circumstances.

[9] The respondent also cited *Re Barrieau Estate*, 2008 NSSC 162, wherein a small portion of the executor's costs were awarded on a solicitor/client basis as he considered the challenge to the Will frivolous and vexatious. The unsuccessful applicant was then denied his costs in the matter.

[10] In *Fort Sackville Foundation v. Darby Estate*, 2010 NSSC 45, Moir, J. further reviewed the general practice of awarding an executor solicitor/client costs from the estate while the opposing party, if not acting vexatiously is entitled to receive party and party costs from the estate.

[11] The circumstances of this case, although different than these authorities, merit that the successful party should have his solicitor/client costs paid in the amount of $40,000.00 plus HST, inclusive of disbursements.

[12] Although the executrix, Susan Wamboldt, was the unsuccessful proponent on the Will dated August 12, 2000 and the court found the deceased did not have sufficient testamentary capacity to properly execute the Will, I believe that the usual rule should apply. Randy Wamboldt's solicitor/client costs should be borne by the estate and not Susan Wamboldt in her personal capacity.

[13] Susan Wamboldt was the unsuccessful respondent in this proceeding. Her conduct was called into question by the court, in the drafting and execution of the

2000 Will given her father's deteriorating health. I note, however, that she cared for her father over the years of his final decline. She renovated the family home, which she then shared with her father. She did not waste the estate but in fact increased it, in its value, namely the real property located at 6521 Berlin Street, Halifax, Nova Scotia.

[14] Although unsuccessful, it is not the court's intention to be punitive toward Ms. Wamboldt. She shall have her costs paid on a party and party basis to be paid by the estate. It is my hope that this award of costs will bring the entire matter to its conclusion. I agree that Mr. Fownes' suggestion that Graham Wamboldt, if agreeable, should be by agreement asked to act as the alternative personal representative under the Will dated October 15, 1996, which is to be admitted into probate in common form.

Justice M. Heather Robertson