PROBATE COURT OF NOVA SCOTIA
Citation: Hand v. Hand Estate, 2011 NSSC 53

Date: 20110207
Docket: Probate No. 56949
Hfx No. 325163
Registry: Halifax

The Estate of Pauline Hand

DECISION on COSTS

Judge:	The Honourable Justice Gerald R. P. Moir
Date of Hearing:	Written submissions only
Last Written Submissions:	January 14, 2011
Counsel:	B. William Piercey, Q.C., counsel for the applicant, Richard Hand A. Douglas Tupper, Q.C., Daniel Feron Wallace, and Sara Mahaney, counsel for the respondents, Dr. Robert F. Hand, Miranda Hand Spilios and Penelope Courtin who lately act on their own Timothy C. Matthews, Q.C. and Jason Thomas Cooke, counsel for the Estate of Pauline Hand

Moir, J.:

[1] Mr. Richard Hand applied for an order that he has a one-half interest in a condominium held jointly by his parents until the death of his mother. However, by the time the application was heard, Mr. Hand allowed that title passed to the survivor and he contended that his parents made mutual wills supported by an implied promise against revocation, which promise his father breached by making a will in favour of his sister after the death of his mother.

[2] I found that the wills were not mutual and that no agreement against revocation could be implied. There was also an issue about the failure of the representatives of Mrs. Hand's estate to provide an accounting. That was resolved, but it was resolved only as the hearing began.

[3] The father, Dr. Robert Hand, sought party and party costs against his son. On Dr. Hand's behalf, Mr. Tupper pointed out that Tariff A provides for costs of $38,750 on the basic scale if the value of the condominium is used as the "amount involved" and $26,750 if one-half value, the amount originally at issue, is used.

However, Dr. Hand and his daughter are now acting on their own. They contend that the entire application was a sham and that no lawyer should be paid anything.

[4] Richard Hand is co-executor of his mother's estate, as well as the party who claimed a one-half interest in the condominium. He was represented in his personal claim by Mr. Piercey, who had no involvement with the issues about estate accounting.

[5] Richard Hand seeks to have his solicitor and client costs paid out of the estate. Alternatively, he seeks party and party costs.

[6] Mr. Tupper and Mr. Piercey refer to *Horne Estate*, 2003 NSPB 1 in which Registrar Atton adopted Ian Hull's summary of considerations favourable to an award of costs out of an estate. This is found at para. 3 of her decision:

- where the litigation arises out of the acts or fault of the deceased;
- where the order sought is for the protection of the trustee, such as an interpretation problem or where other directions or advice of the court are sought;
- where there are reasonable grounds for the litigation such as proof in solemn form;

- where suspicious circumstances are demonstrated;
- where the court's scrutiny or supervision is warranted.

[7] Mr. Piercey points out that, in addition to these factors, Mr. Hull went on to describe the general practice and two principles.

[8] As for general practice, he said "In estate litigation, however, the Canadian and English courts have traditionally exercised their discretion by departing from the usual costs rule whereby the unsuccessful party pays the costs of the successful party." I emphasize "estate litigation".

[9] Mr. Hull suggests that two principles prevail over the "usual costs rule":

> First, where the difficulty, conflicts or ambiguities which give rise to the litigation are either in whole or in part, the fault of the testatrix or the fault of those parties interested in the residue, the courts have ordered the parties' costs to be paid out of the estate. Second, there is a public interest in ensuring that wills are valid and that the needs of the deceased's dependants are properly provided for.

[10] Mr. Hull's descriptions of practice and principle is consistent with Nova Scotia jurisprudence, such as the following passage from *Morash v. Morash Estate*, [1997] N.S.J. 403 at para. 22:

> 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…

[11] In connection with the claims for solicitor and client costs, Mr. Piercey refers to *Bley v. Bley*, [1986] B.C.J. 1644 (S.C.), in which lack of testimony capacity was alleged; *Levy Estate,* [1989] O.J. 660 (O.C.A.), which raised the then novel question of whether a bequest to a foreign charity qualifies as a charitable trust; *Syrota v. Clark Estate,* [1991] M.J. 466 (Q.B.), concerning testimony capacity and undue influence; *Irwin v. Cupolo,* [1999] O.J. 3759 (S.C.J.), testimony capacity; *Morash v. Morash Estate*, testimony capacity, and; *Fort Sackville Foundation v. Darby Estate*, [2010] N.S.J. 53 (S.C.), which was about the interpretation of a gift in a will and an attempt to apply *cy-près* to it.

[12] In connection with Mr. Hand's alternative claim for party and party costs, I am referred to *Re. Harmer*, [1963] O.J. 778 (H.C.J.), a motion for directions; *Champ Estate*, [1986] S.J. 277 (Q.B.), testator's family maintenance; *Ramsay*

Estate, [2004] N.S.J. 375, testimony capacity, and; *Wamboldt v. Wamboldt Estate*, [2010] N.S.J. 328 (S.C.), testimony capacity and undue influence.

[13] The central issue in Mr. Hand's application was not about the meaning of his mother's will. She clearly made a gift to him that failed. The evidence referred to at para. 23 and 24 of the main decision shows that the possibility of that failure was brought to the attention of Mrs. Hand before she executed the will.

[14] Rather, the issue was one between Mr. Hand and his father. Was Dr. Hand required to stand by his 1999 will, including the gift of the condominium to his son? The application was not "estate litigation". It was litigation between two living persons about the contractual obligations of one of them.

[15] I have therefore determined not to award costs against the estate in favour of Richard Hand.

[16] The purpose of an award of costs is to provide the successful party with a partial but substantial indemnity against legal fees measured by what would ordinarily be charged to a client for the kind of work undertaken on behalf of the

successful party in the actual case. In light of the present position of Dr. Hand and his daughter, and my determination not to order costs in favour of Mr. Hand, those three parties will bear their own costs.

[17] It was necessary for the estate to participate in the application because it originally involved questions about Mrs. Hand's property, it involved a demand for accounting, and the late Mr. Thomas Burchell, Q.C., was subpoenaed to give evidence about both the administration of the estate and the wills he drafted. Considering all of the circumstances, the representatives of the estate should be entitled to recover their solicitor and client costs from the estate.

J.