SUPREME COURT OF NOVA SCOTIA

Citation: Davies v. Collins, 2011 NSSC 227

Date: 20110608
Docket: Hfx. No. 328880
Registry: Halifax

Between:

Pamela Mary Davies

Applicant

v.

Jennifer Jaroda Collins

Respondent

Judge: The Honourable Justice Peter P. Rosinski.

Heard: November 4, 2010, in Halifax, Nova Scotia

Counsel: Timothy Matthews, Q.C., for the Applicant
J. Gordon Allen, for the Respondent

By the Court:

Introduction

[1] Ms. Davies filed an Application in Chambers on May 10, 2010 requesting a declaration by this Court regarding the following question:

> Since the laws of Trinidad and Tobago declare that a marriage *in extremis* does not revoke a party's prior Will, should it be given effect under the *Wills Act* R.S.N.S. 1989 c. 505 s. 17?

[2] Ms. Davies was divorced from Dr. Davies. They had lived separate and apart since March 6, 1993. They settled their divorce by Minutes of Settlement signed June 5, 2001, which were incorporated into a Corollary Relief Judgment of this Court dated August 11, 2001.

[3] Dr. Davies' Last Will and Testament was dated July 25, 1989. He moved to Trinidad and Tobago in 1999 and started a relationship with Ms. Collins in early 2000 that led to their marriage in Trinidad on July 27, 2010. Dr. Davies while on his deathbed in a hospital, married Ms. Collins in Trinidad on July 27, 2007, and died July 29, 2007.

[4] A marriage *in extremis*, or deathbed marriage, does not, according to the laws of Trinidad, revoke a deceased's prior will.

[5] Ms. Davies argued that therefore the Nova Scotia Will was valid, although according to the laws of Nova Scotia, it would not be so.

[6] On April 18, 2008, Ms. Collins was appointed Adminstratrix of Dr. Davies' estate in Trinidad because at the time she was unaware a will existed.

[7] Ms. Davies made an Application in Chambers in which she sought a declaration from this Court in order to allow the Will to be probated in Nova Scotia. This would allow her to be clothed with status as the Executrix, and require her to carry out Dr. Davies instructions. In the Will she is his sole beneficiary.

[8] In my written Decision dated December 16, 2010, I concluded that the marriage *in extremis* in Trinidad did revoke the July 25, 1989 will of Dr. Davies.

[9] Therefore, Ms. Collins was the successful party in the Application.

[10] Counsel made efforts to resolve the issue of costs but have been unable to do so.

[11] The matter of costs is the remaining issue and subject of this Decision.

The Position of the Parties

[12] Ms. Davies argues that:

1. This is an estate matter, which was reasonably dealt with by her, and the general rule is therefore that the costs of the successful party should be paid out of the estate. Moreover, both parties should have solicitor-client based costs awards in the circumstances.

2. Alternatively, there is also precedent in *Re Ramsay Estate* 2004 NSSC 162 (Wright, J.) for an unsuccessful party to be paid party and party costs out of the estate (who in that case was not

the Executor, whereas the successful party / Executor would receive his solicitor-client costs paid out of the estate).

[13] Ms. Collins argues that:

1. Although this is an estate matter, the unique facts support a departure from the approach that sees the costs of litigation paid out of the estate;

2. Ms. Davies should be responsible to pay to Ms. Collins, the successful party, solicitor client based costs because there are indicia of inappropriate conduct by Ms. Davies;

3. Alternatively, party and party costs should be paid based on an agreed upon estate value of 200,000 - 300,00$ Cdn, Tariff A Scale 2 Basic to Scale 3 (*Civil Procedure Rule* 77). That would give a range of costs payable of $22,750 to $28,438 and ½ of 2000 per trial day or 1,000$ plus reasonable and necessary disbursements. [I note that CPR 77.06(2) until recently read in part: “party and party costs of an application must... be assessed in accordance with Tariff “A” as if the hearing was a trial”. The Rule was meant to apply only to applications in court and has been accordingly amended].

The Law of Costs

[14] The applicable principles may be found in the *Civil Procedure Rules* (especially CPR 77), case law and text writers (eg. the oft cited *The Law of Costs*, 2nd Edition (updated to Nov. 2010) Mark M. Orkin, Canada Law Book, Aurora, Ontario Canada [“Orkin on Costs”].

[15] Ultimately a Court is asked to exercise its discretion to “make any order about costs as the Judge is satisfied will do justice between the Parties” - CPR 77.02(1). Although CPR 77.02(2) notes that “nothing in these Rules limits the general discretion of the judge to make any order about costs”, the *Civil Procedure Rules* have summarized some of the Courts’ traditional practices in the case of typical litigation:

A) Costs of the proceeding follow the result, unless a Judge orders or a Rule provides otherwise - CPR 77.03(3).

B) A Judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law -

> CPR 77.03(2) [i.e. party and party costs are generally the norm otherwise].

[16] The available options are typically:

> "...may order that parties bear their own costs, one party pay costs to another, two or more parties 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" - CPR 77.03(1).

[17] In contrast to the general notion that costs "follow the result", "estate litigation" is an exception. As Freeman, JA noted for the Court in *Morash v. Morash Estate* [1997] NSJ No. 403 (CA):

> 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.
>
> [Emphasis added]

[18] Just a year later, Ian Hull succinctly summarized the practice in Ontario, which seems consistent with the Nova Scotia practice and included the rationale for such practices:

> In estate litigation, however, the Canadian and English courts have traditionally exercised their discretion by departing from the usual cost rule whereby the unsuccessful party pays the costs of the successful party. [FN5]
>
> Instead, it would seem to be the general practice of the courts in estate litigation is to consider and apply two principles. 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. Accordingly, as the provisions of a will must be properly interpreted and applied its validity or invalidity determined with some degree of predictability, the courts seem to have relieved the unsuccessful parties to the litigation from paying the costs of the successful party.
>
> **The exception in estate litigation proceedings was fully developed by Sir J.P. Wilde: [FN6]**
>
>> The basis of all rule on this subject should rest upon the degree of blame to be imputed to the respective parties; and the question, **Who should bear the costs?** will be answered with this other question, **Whose fault was it that they were incurred?** If the fault lies at the door of the testator, his testamentary papers being

surrounded with confusion or un-certainty in law or fact, it is just that the costs of ascertaining his will should be defrayed by his estate.

If the party supporting the will has such an interest under it that the costs, if thrown upon the estate, will fall upon him, and he by his improper conduct has induced a litigation which the Court considers reasonable, it is not unjust that the estate should bear the costs of the litigation which his conduct has caused.

But if the testator be not in fault, and those benefited by the will are not to blame, to whom is the litigation to be attributed? In the litigation entertained by other Courts, this question is in general easily solved by the presumption that the losing party must indeed be in the wrong, and, if in the wrong, the cause of a needless contest. But other considerations arise in this Court. It is the function of this Court to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial inquiry is in a manner forced upon it. **Those who are instrumental in bringing about and subserving this inquiry are not wholly in the wrong, even if they do not succeed. And so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs, if chargeable with no other blame, than that of having failed a suit which was justified by good and sufficient grounds for doubt.**

There is still a further class of cases. I speak of those in which, beyond the execution of the will and the capacity of the testator, **the opposing party takes upon himself to question the conduct or good faith of others and to place on the record pleas of undue influence or fraud.** These are affirmative charges; they ought not to be made except upon apparently very sufficient ground. But though they may and do differ largely in the degree of probability or suspicion to be demanded for their justification, it is not easy to say that they differ in nature from pleas denying execution or capacity. Both classes of defence are addressed to the same question, what was the will of the testator, and both are

> within the scope of the subject entrusted to the vigilance of the Court. **Here, also, it seems just and meet, if the circumstances of the case have rendered the inquiry a proper one, that neither party should be condemned in cost.**
>
> From these considerations, **the Court deduces the following rules for its future guidance:** first, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate, secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

- "Costs in Estate Litigation" 18 E.T.R. (2d) 218, Ian M. Hull

[19] He observed that the general rule and rationale are subject to exceptions. He proposed some general guidelines that emerge from the case law:

> While the conventional costs rule in estate litigation have recently been confirmed by the courts [FN7] and counsel may rely on the proposition that, in the right circumstances, the costs of the investigation will usually be paid out of the assets of the estate, it is in the determination of what are the "right circumstances" that the difficulty arises; and it is with this determination that I propose to deal. It is the practical impact of this cost rule that will be explored in this article.
>
> It should be said at the outset that great care should be exercised in embarking on estate litigation, given the possibility that the costs may not be awarded to your client or may be awarded against your client.
>
> Some considerations favourable to an award of costs out of the estate are:

· 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 court's scrutiny or supervision is warranted.

Some considerations unfavourable to an award of costs out of the estate are:

· proceedings unwarranted or unjustified;

· intransigence of a party to a proceeding arising out of extra-legal considerations such as bad feelings between the parties;

· actions by a party designed to delay or prohibit the trustee's administration of the estate without proper reasons for such action;

· unnecessary proceedings, where for example, a subsequent will is not located by the executor or executrix as a result of an incomplete search thereof.

However, the question that must be foremost in counsel's mind is how to convince the court that the questions raised warrant investigation and inquiry of the circumstances, are sufficient to require proceedings to be taken.

[20] In *Re Hand Estate* 2011 NSSC 53 [2011] NSJ No. 70, Moir, J. approvingly cited this article. Notably, Moir, J. had to determine whether that case involved "estate litigation". He found that it did not, and therefore awarded costs accordingly.

[21] Both parties in the case at Bar agree that this matter is "estate litigation". They differ on whether the traditional practice of all parties receiving their solicitor client or party and party costs out of the estate should be displaced by a "costs follow the result" award instead, and whether solicitor-client or party and party costs are appropriate.

Application of the Principles to the case at Bar

[22] The facts in this case are so unusual that it is fair to consider the legal issue involved as novel. There are no reported cases directly on point. The underlying principles regarding resolutions of the conflict of laws controversy herein are ambiguous.

[23] Ms. Collins, unaware of the existence of the Will in Nova Scotia, applied for and was granted Administration in Trinidad over Dr. Davies' estate on April 18, 2008. Ms. Davies in Nova Scotia, and aware of the Grant of Administration in Trinidad as of July 7, 2008 [para. 28, Ms. Davies' affidavit], sought to be appointed Executrix. Early in 2009 Ms. Davies began litigation in Trinidad to contest the Grant of Administration. After eight months and six appearances in The High Court of Justice, that Court ruled on December 17, 2009 against Ms. Davies. By letter dated January 26, 2010, the Registrar of Probate in Nova Scotia, declined to "process a Grant of Probate for this estate as a Grant has already been issued in [Trinidad]".

[24] Whether the marriage *in extremis* would render the Will in Nova Scotia revoked by operation of law was not a vexatious, or unreasonable matter to bring to this Court for its consideration.

[25] Ms. Collins argues however, that the conduct of the litigation by Ms. Davies was questionable, and may have reached a level which the Court may consider unfavourably reflects on Ms. Davies insofar as a decision on costs is concerned.

[26] Ms. Collins points to:

- Ms. Davies portraying Ms. Collins in a misleading and "a less than flattering light in affidavits" (as a mere "housekeeper") [p. 2 brief Collins];

- Ms. Davies filing of a number of Third Party affidavits that were not "at all relevant to any of the issues before the Court" - yet intended to question the legitimacy of the marriage in Trinidad, and Ms. Collins' motivation. [P. 4 brief Collins];

- The fact that Ms. Davies had unsuccessfully contested, yet not appealed, the Grant of Administration in Trinidad decided on essentially the same issue as herein since that Court was aware of the Nova Scotia Will, and had the benefit of an "expert opinion" about the effect of the marriage *in extremis* on the Nova Scotia Will (which the Court must have accepted because it confirmed the intestacy) - I note that at para. 172 of my Decision I concluded that the essential pre-conditions of *res judicata* had been met;

- That Ms. Davies, "failed to advise [this Court] about the 'expert opinion' that was sought and obtained jointly by the Applicant and the Respondent [for the Court's consideration in Trinidad]"

> - p. 5 Collins brief. This was important because Ms. Davies' counsel argued in the brief of October 25, 2010 regarding the *res judicata* issue [[at pp. 3 - 4] and p. 6] and oral argument on November 4, 2010, that it is unclear why Gobin, J. in Trinidad dismissed Ms. Davies' application to revoke the Grant of Administration. After Exhibit 1 was filed during the November 4, 2010 hearing (that is the complete expert's report; only a partial copy was available to Ms. Collins and is at Exhibit Q of Ms. Collins' affidavit) we had a record of the complete opinion which was provided to the Trinidadian Court. This report must have been determinative evidence which prompted the dismissal of Ms. Davies' application without reasons, yet was not included or alluded to in Ms. Davies' initially filed materials / affidavit - see para. 45 Ms. Davies' affidavit;

-That since Ms. Davies had agreed in the Minutes of Settlement in 2001 as a matter of contractual agreement with Dr. Davies to 'renounce all rights which [she] has to the administration of the other's estate and... releases and discharges... any claim which [she] has, can or may have to any share of that estate, and subject to any disposition made by will... [which I would tend to interpret as any will made after the Minutes of Settlement are executed]" what then would be the entitlement of Ms. Davies to claim in the Probate Court in Nova Scotia that she is the proper Executrix? And if the Probate Court was aware of those Minutes, why would it permit her to be

appointed Executrix? If Ms. Davies had voluntarily surrendered that entitlement, how can she now purport to act in that capacity, particularly where she is claiming that the Estate should pay her costs, yet she is the sole beneficiary if the Will is not revoked?

- As Ms. Collins put it in her brief: "... what [legitimate] goals did [Ms. Davies'] Application hope to achieve? What are the motivations?" - p. 5 Collins brief.

[27] These questions may better be addressed while keeping in mind the purposes of costs awards generally. As Warner, J. noted in *National Bank Financial Ltd. v. Potter* 2008 NSSC 213 [2008] NSJ No. 291 at para. 16 citing Orkin on Costs:

> Orkin identified five purposes for costs awards. Paramount is the principle of indemnification. The others are: to encourage settlement, deter frivolous actions and defences, discourage unnecessary steps that unduly prolong the litigation, and to facilitate access to justice.

[28] I find in this case that:

1. As it is an "estate matter" the presumptive costs award, which I have discretion to override, is that Ms. Collins and Davies should both receive their costs from the Estate.

2. Ms. Collins conducted the litigation in a reasonable manner.

3. Ms. Davies' motivations and conduct of the litigation are questionable:

(a) Her claim rests on the Will's survival - if it survives, so does her sole beneficiary status of all Dr. Davies' estate;

(b) Similarly she would be confirmed as Executrix as she applied for it in Probate Court, yet it is not apparent that she made the Court at that time aware of the Minutes of Settlement relinquishing that entitlement;

(c) In pursuit of her appointment as Executrix, she presented this Court with two affidavits of her own (the later one containing almost entirely facts alleged about the status of Ms. Collins' relationship with Dr. Davies which are irrelevant to this Application and can be considered disparaging); and the affidavits of Justin Scale, and Brian and Andrea Shorey and

Solicitor Neil Jacobi, the former of which both go to Ms. Collins' status and are irrelevant to this Application;

(d) Ms. Davies unsuccessfully contested the validity of the Grant of Administration in Trinidad, yet rather than appeal that decision, she sought to litigate the matter afresh in this Court (I recognize that there are differences between the proceedings). Moreover, her initial affidavit and briefs of May 10, 2010, did not refer to the "expert opinion" that the Trinidadian Court received;

(e) I note that in the draft Order provided to the Court by Ms. Davies, filed with the original Application May 10, 2010, the Applicant provided in its suggested relief that:

> "The Respondent shall pay costs on a party and party basis

to the Applicant, in the amount
of $ _________ .” .

Conclusion

[29] I have found the Will to be revoked. Ms. Collins, as wife of Dr. Davies and appointed in Trinidad as Administratrix, has exclusive control and benefit of the estate of Dr. Davies according to Trinidadian law.

[30] Dr. Davies’ estate also had assets in Canada and the United Kingdom. The status of those assets is uncertain insofar as their availability to pay costs and may yet be subject to further litigation. To order costs be paid out of the estate at this time may be practically difficult and inappropriate.

[31] I also found Ms. Davies’ motivations and conduct of the litigation sufficiently troubling, and to such an extent that when considered with the other circumstances herein, I am satisfied a departure from the presumptive costs award in estate matters is justified. I find that indemnification should be the paramount objective of costs in this case, and that party and party costs are appropriate.

[32] To do justice between the parties here requires that I order Ms. Davies to indemnify Ms. Collins; but not to such an extent as would otherwise be appropriate, because the issue herein is a novel one; and not from the estate of which Ms. Collins is the sole beneficiary, as it would not be right to have her effectively pay Ms. Davies payment of costs with one hand so Ms. Davies could pay Ms. Collins back into her other hand.

[33] I therefore order Ms. Davies to pay to Ms. Collins the costs of this Application, based on Rule 77.06(3) and 77.07.

[34] I conclude Tariff “C” maximum 1000$ multiplied by 4 times is appropriate (for an amount of 4,000$), plus reasonable and necessary disbursements pursuant to *Civil Procedure Rule* 77.13, payable forthwith.

[35] I will require Ms. Davies’ counsel to prepare the Order.

J.