SUPREME COURT OF NOVA SCOTIA
Probate Court of Nova Scotia
Citation: *Kenny Estate (Re)*, 2016 NSSC 256

Date: 20160928
Docket: Hfx. No. 439153
Probate No. 60774
Registry: Halifax

Between:

Erin Kenny and Jennifer Kenny

Applicants

v.

Angela Moss as executrix of the Estate of Leslie Kenny

Respondent

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	April 25, 26, 27, 2016, in Halifax, Nova Scotia
Final Written Submissions:	August 22, 2016, Applicants' Submission on Costs August 31, 2016, Respondent's Submission on Costs
Counsel:	Brian Casey, Q.C. and Geoffrey J. Franklin, for the Applicants Brian F. Bailey, for the Respondent

By the Court:

[1] This costs matter arises out of the applicant, Erin Kenny's, unsuccessful application for proof in solemn form, which was dismissed on the primary ground that by the time the applicant commenced the proceeding there were no assets left in the estate, and the alternate ground that the respondent established that the testator had testamentary capacity when he made the will: see *Kenny v. Kenny Estate*, 2016 NSSC 214. The respondent executrix, Angela Moss, now seeks costs on the application.

[2] Both parties submitted briefs at the request of the court. These submissions, in my view, were unhelpful and deficient because the caselaw submitted pre-dated and failed to recognize that there are recent relevant Court of Appeal decisions on the issue of costs in probate matters.

Applicable Law

[3] Costs in probate matters are governed by the *Probate Act*, S.N.S. 2000, c. 31, and by the *Civil Procedure Rules*, specifically Rule 77. The *Act* provides, at s. 92(1):

> 92 (1) In any contested matter, the court may order the costs of and incidental thereto to be paid by the party against whom the decision is given or out of the estate and if such party is a personal representative order that the costs be paid by the personal representative personally or out of the estate of the deceased.

[4] In *Re*: *Baird Estate*, 2014 NSSC 444, [2014] N.S.J. No. 666, at para. 10 the court stated that s. 92 "does not limit the courts discretion to deal with costs" under Civil Procedure Rule 77. Rule 77 sets out the court's general discretion over costs, giving the judge the power to "at any time, make any order about costs as the judge is satisfied will do justice between the parties": Rule 77.02(1). The general rule is that "[c]osts of a proceeding follow the result, unless a judge orders or a Rule provides otherwise":. Rule 77.03(3).

[5] The Court of Appeal discussed the principles governing costs in Probate matters in *Prevost Estate v. Prevost Estate*, 2013 NSCA 20, [2013] N.S.J. No. 74, and in *Casavechia v. Noseworthy*, 2015 NSCA 56, [2015] N.S.J. No. 238.

[6] The Court of Appeal further provided guidance in this area in *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79, [2015] N.S.J. No 339, where the application judge had dismissed a son's application to set aside his mother's will on the basis of incapacity. The Court of Appeal affirmed that decision, and discussed the principles of costs in probate matters. Bryson J.A. cited *Mitchell v. Gard* (1863), 164 E.R. 1280, where the court described the rationale for the principle that "litigation caused by the testator or the residuary beneficiary should be borne by the estate".

> …. 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.
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> [Emphasis by Bryson J.A.]

[7] Bryson J.A. went on to explain why the traditional rule was no longer well-grounded in law:

> 95 It is the public interest criterion - the second principle in the forgoing emphasized quotations - which mitigates the usual costs rule that the loser pays the winner. But the need for such indulgence is now much diminished because civil procedure has substantially evolved since 1863. Parties now enjoy an enhanced pre-trial disclosure of documents and witnesses unavailable to 19th century litigants. Pre-trial access to medical records, medical opinions, professional and lay witnesses is commonplace. The likely outcome of litigation is more apparent now. There is less reason to incur the time and expense of a formal hearing. For these reasons the second Mitchell principle recedes in favour of the usual costs rule.
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> ….
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> 98 The policy reasons for the old rule are weaker now. By contrast, litigation is more expensive than ever. A rule that accommodates a losing party with costs is an inducement to litigation. Although the public interest component remains in probate litigation, the liberality of contemporary disclosure and the court's policy of encouraging settlement, (*Ameron v. Sable*, 2013 SCC 37), favours the usual rule that the victor should be indemnified by the vanquished.
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> [Emphasis added]

> 99 To the extent that there was a traditional practice of paying costs of all parties out of the estate, those days are over. Provided that a personal representative is discharging her duties and is acting reasonably, she can be expected to be indemnified from the estate. Not so with an adverse party, who may obtain party-party costs if successful, but may have to bear her own costs or even have to pay them, if unsuccessful. If the court proceeding can be ascribed to conduct of the deceased or residuary beneficiaries, a losing party may still recover costs from the estate, although usually on a party-party basis...
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> [Emphasis added]
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> 100 Awarding costs against or out of an estate means that the expense usually is borne by the residuary beneficiaries. It is appropriate to ask whether that is a proper burden for them to bear. Where the personal representative is discharging her duties and there is no other unsuccessful party to share at least some of the burden, there is nothing that can be done to mitigate this indirect charge on the generosity of the testatrix, at the expense of the residuary beneficiaries. But where, as here, there is an unsuccessful party who is the cause of the litigation, it is proper that the unsuccessful party bear much of the burden. Moreover, in this case, there was very little lay evidence, and no expert evidence, sustaining Mr. Wittenberg's allegations. Finally, those allegations were not confined to incapacity, but also cast the aspersion of undue influence.
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> [Emphasis added.]

[8] In considering the scope of the court's discretion, Bryson J.A. said:

> 104 Some of the cases refer to "reasonable grounds" for the litigation or litigation not being "frivolous or vexatious" as reasons to exercise a cost discretion in favour of a losing party. Certainly those may be relevant considerations in the exercise of discretion. But those considerations should be tempered by the ability of the applying party to assess her case at an earlier stage. As Mr. Hull counsels in his article:
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> > However, it is important to note that the timing is everything and in proceedings with estate litigation matters, careful assessment of your case must be made, not just at this [preliminary] stage, but throughout the proceedings up to and including the trial of the issues.
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> Accordingly, a proceeding that may initially look reasonable can appear otherwise when all the circumstances emerge. The prospects of success can disappear as the matter unfolds. In such cases, parties risk denial of costs out of the estate or even the payment of costs to the estate where the judge considers it appropriate.

[9] The appellant argued that the finding of suspicious circumstances in the court below should have entitled him to costs. In rejecting this argument, Bryson J.A. said:

> 108 While suspicious circumstances might, in principle, justify relieving a losing party from paying costs - or may even justify payment of some costs to that party - there is no rule to that effect. It is obvious that an allegation of readily dispelled suspicious circumstances could frustrate the usual rule that the successful party be paid by the loser. In each case it would be a matter for consideration in the court's exercise of its discretion, applying the applicable principles to the circumstances before it.

Analysis

[10] The applicant seeks solicitor and client costs to be paid out of the estate. She submits that the application she brought was appropriate in all respects because the testator's mental capacity was in a state of decline and warranted further investigation. What the applicant failed to address is the fact that the Court of Appeal's recent decision in *Wittenburg Estate, supra,* indicates that an unsuccessful applicant (who is not the representative of the estate) is not automatically or presumptively entitled to costs at all, let alone solicitor-client costs, simply on the basis of having brought a non-frivolous application. Bryson J.A.'s *Wittenberg* decision indicates that the general costs rules will govern in this situation. Moreover, it is arguable in this case that it was not reasonable for the applicant to bring the application, given the plain wording of the *Probate Act* section that was dispositive of the application. The applicant alternatively seeks party-and-party costs in the moderate amount of $3500. In my view, the guidance of the recent caselaw suggests that a party that proceeds in the face of a plainly-worded statutory provision that nullifies their claim should not receive costs.

[11] The applicant was aware of the provision in the *Probate Act* because it was raised by the respondents in their notice of contest. I am satisfied that she should not have her costs in these circumstances.

[12] Costs are payable by the applicant. The next question is quantum payable.

[13] Pursuant to my decision, both parties submitted written submissions on appropriate costs.

[14] The executrix, Ms. Moss, seeks costs of $70,921.89 made up of:

i. Tariff A costs of $67,188; and

ii. disbursements totalling $3,773.89.

[15] Counsel submits that Tariff A is applicable because:

i. the matter was heard over a number of days with extensive evidence, including experts;

ii. numerous affidavits with many items of documentation were filed; and

iii. the issues were not uncomplicated.

[16] Counsel on behalf of Ms. Moss seeks Scale 3 on an amount involved of $726,510.98 and $4,000 for three days of hearing.

[17] The amount involved, according to Ms. Moss, was the value of the estate as stated in the inventory as $109,731.79, plus the amount of $616,779.19, which represent the amount set out in para. 14 of her affidavit filed in this matter. These amounts represent the value of assets she dealt with between September 2011 and April 4, 2013. In a related action the applicant sought to set aside these transfers and, therefore, Ms. Moss contends the value of these assets should be taken into account in determining the "amount involved".

[18] Disbursements claimed are as follows:

a.	Photocopy Expense (1,500 copies) @ $0.25	$375.00
b.	Couriers	$159.14
c.	Discovery Transcript	$53.20
d.	Medical Records (Capital Health)	$40.00
e.	Registered Mail	$40.80
f.	Account – Mr. Matthews	$1,207.50
g.	Account – Tim Matthews	$1,858.25
TOTAL DISBURSEMENTS		**$3,733.89**

[19] Mr. Bailey filed an affidavit with the court on August 22, 2016 which stated that these disbursements were reasonably incurred, I am satisfied that they are.

[20] As to the quantum of costs sought, as I have commented previously, the applicant's (as well as the respondents) costs' submissions are devoid of the relevant law.

[21] I am not satisfied that there is any clear reason for applying Scale 3. Nor does counsel suggest any principled reason for combining the non-probate amount with the inventory amount in determining an amount involved, aside from the suggestion that the probate decision will effectively dispose of the second proceeding. Counsel does not point to any basis for this conclusion on the record. Accordingly, at most, a reasonable assessment of party-and-party costs would be on the basic scale, on an amount involved of $109,731.79. Costs on Tariff A, Scale 2 on $109,731.79 would be $12,250.00, plus $4,000.00 for hearing days, for a total of $16,250.00.

[22] Costs are payable by the applicant in the amount of $16,250.00 plus disbursements of $3,733.89, for a total payable of $19,983.89.

Pickup, J.