

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Morrison v. Morrison Estate, 2012 NSSC 451

Date: 20121231
Docket: SPH389094
Registry: Port Hawkesbury, Nova Scotia

Between:

Kenneth Morrison

Applicant

v.

The Estate of Helen Morrison, and its Personal Representative, Dan Alex
Morrison

Respondent

DECISION ON COSTS

Judge: The Honourable Justice Patrick J. Murray

**Oral Decision
on Chambers Application
and Appeal of Taxation:** August 30th, 2012 in Sydney, Nova Scotia

**Submissions
on Costs:** September 4th, 2012 and September 26th, 2012

**Written Decision
on Costs:** December 31st, 2012

Counsel: Darren Morgan, Counsel for the Estate of Helen
Morrison
Hugh R. McLeod, Counsel for Kenneth Morrison

By the Court:

[1] This is a *Decision on Costs* in relation to my ruling on August 30, 2012. On that date, I ruled the Application of Kenneth Morrison was without merit. The Application was to remove his brother, Dan Alex Morrison, as Executor (Personal Representative of the Estate of Helen Morrison) and for an Order that Kenneth Morrison be conveyed the property in question located at 739 Passage Road, Loch Lomond, Richmond County, Nova Scotia. Kenneth Morrison asked that he be appointed to replace his brother, Dan Alex Morrison, as Executor.

[2] The Applicant further appealed a decision of the Registrar of Probate as to taxation of the Bills of Costs charged to the Estate by the Proctor, the late Gerard MacKenzie and Darren Morgan. Mr. Morgan continues to represent this Estate, both in the Application, and the Appeal. I was also asked to fix the Proctor's fees-to-date on respect of this Estate.

[3] Due to family discord, the Estate has not advanced. Instead, it has been plagued by disagreement and litigation. This is unfortunate, as it is not a large Estate.

[4] Mrs. Morrison died on January 1st, 2010. In her Will, which was admitted to Probate on February 15, 2010, she appointed her son, Dan Alex Morrison, to be the Executor and Personal Representative. She left her real property, consisting of her home, to her son Kenneth Morrison. She left the remainder of her Estate to her son, Peter Morrison, who has since died.

[5] Mrs. Morrison's Estate consisted mainly of her home, which is valued at \$73,900.00. Aside from this, there was her furniture, personal effects, and a small bank account of several thousand dollars.

[6] The Estate was what is known as "cash poor". The Estate expenses exceeded the amount available to pay the bills. Kenneth Morrison moved into the dwelling. The Executor, Dan Alex Morrison, paid the expenses from his own money, in the hope of recovering them, while still allowing him to convey the property to his brother, Kenneth Morrison, which was his mother's wish.

[7] Kenneth Morrison accused his brother, Dan Alex Morrison, of mismanaging the Estate, and preventing him from receiving a Deed to the property, which Kenneth Morrison insisted he had a right to. Further, Kenneth Morrison became ill with cancer. Prior to that, he had arranged for a mortgage to pay the expenses and obtain a Deed from the Estate.

[8] The parties had legal counsel but could not reach an agreement which would allow the bills to be paid in exchange for a conveyance of the property, from the Estate.

[9] Due to the disagreement, the legal bills to the Estate increased. Kenneth Morrison, through his counsel, alleged that in addition to not paying the Estate bills or distributing the Estate, the actions of the Executor (and Proctor) unnecessarily complicated what was a simple Estate, consisting of one major asset, the house.

[10] The Executor, Dan Alex Morrison, stated that it saddened him that, to date, he has been unable to carry out his mother's wishes.

[11] His position was he tried every reasonable measure to distribute the property to his brother, but has been met with opposition by Kenneth Morrison at every turn. Despite various and numerous attempts (submitted through his counsel), he was unable to reach a satisfactory arrangement, through no fault of his own. He denied any wrongdoing or that he mismanaged the Estate.

[12] The grounds for the Order sought by the Appellant, Kenneth Morrison, were as follows:

- (1) Failure to provide a Deed within one year - Section 53(1) of the *Probate Act*.
- (2) Failure to permit transfer of the property when Kenneth Morrison had arranged a mortgage, contrary to Sections 52 and 53 of the *Probate Act*.
- (3) Failure to make timely distribution of the Estate assets.

- (4) Failure to accept a Solicitor's undertaking to pay Executor's commission and Proctor's fees.
- (5) Failure to answer correspondence with Proctor needlessly complicating the file for Billing Purposes, with Executor's instructions.
- (6) Failure to agree to sell the property for 90% of its appraised value.

LAW AND ANALYSIS

[13] Section 92(1) of the *Probate Act* deals with costs in contested matters. It states as follows:

“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.”

[14] Section 67 of the *Probate Act Regulations* deals with “Procedures and Powers at Hearings” of contested matters. Section 67(1) allows the Registrar to dispose of issues arising out of an application. Section 67(j) allows the Court to order that costs be paid from the Estate, or by the person who is a party to the application.

[15] On an Appeal, Section 93(2) of the *Probate Act* gives the judge the power to rescind, set aside, vary or affirm the Order or decision appealed from or make any decision or Order the Registrar would have made. On this Appeal, I approved all three (3) of the Bills of Costs in the amounts decided by the Registrar, except for a reduction of \$200.00 to one of the Bills of Costs. In essence, therefore I found that the Appeal of the Taxation was without merit, with that exception.

[16] Section 93(4) of the *Probate Act* states that costs of the Appeal are in the discretion of the Court.

[17] In addition, *Civil Procedure Rule 77* deals with the issue of costs, and in particular Rule 77.03(2), Rule 77.01(b), and Rule 77.02 (1). Read together these *Rules* allow a Court to award costs in Estate matters on a solicitor-client basis, in

exceptional circumstances. The presiding judge has a discretion to make any Orders that will “do justice”, as between the parties.

[18] In Estate litigation, the Estate’s legal costs are generally reimbursed on a solicitor-client basis. This is most obvious in Will matters, and in particular, the interpretation of a Will, for Executors have no personal interest in the outcome, and no other source of reimbursement for their legal expenses. In other matters, unless the Estate has involved itself in frivolous and vexatious litigation, it will normally be the case that the Estate’s legal costs are reimbursed in full.

[19] This is not a departure from the *Rule* that the successful party should have their costs paid by the unsuccessful party. It depends on the circumstances and whether the Estate had a legitimate reason for being involved in litigation. For example, if the successful party is the Residuary Beneficiary, the successful party could end up paying the unsuccessful party, if costs were paid by the Estate, either on a solicitor-client, or a party-party basis. Conversely, if the Testator or Residual Beneficiary were the cause of the litigation, then the Estate may properly be held to be responsible for payment of the costs. Arguably, costs of litigation for an Estate are paid by the Estate, unless involving the Estate was frivolous and without merit. Whether a party’s involvement could be credibly argued, and whether the party’s position was reasonable, having regard to the outcome, are valid considerations. *Morash Estate v. Morash* [1997] N.S.J. 403 (CA); *Fort Sackville Foundation v. Darby Estate* [2010] NSSC 45; Orkin, *The Law of Costs*, 2nd Edition.

[20] The successful party here was Dan Alex Morrison, Personal Representative on the Application. The Estate was represented by Dan Alex Morrison on the Notice of Appeal from the taxation. Both matters were consolidated, and heard together by me under *Rule 37.09*. Both matters involved the Estate, and the actions of its Personal Representative, the Proctor, and the Applicant as Residual Beneficiary.

[21] The Estate and Personal Representative submit it is appropriate that an award of solicitor-client costs be granted in their favour. They submit there are “exceptional circumstances recognized by law” present to make such an award.

[22] The Applicant, Kenneth Morrison, submitted the case of **Hamilton v. Open Window Bakery Ltd.** 2004 SCC 9, 40 B.L.R. (3d) 1, 235 D.L.R. (4th) 193, 316 N.R. 265 in support of his position that no award of solicitor-client costs should be made against him, because there is no evidence of reprehensible, scandalous, or outrageous conduct.

[23] The Respondent acknowledges that **Hamilton** is good authority that solicitor-client costs are generally awarded only where such conduct exists by one of the two parties. The Respondent points, however, to the Court's discussion where allegations of fraud and dishonesty are made with information available to those alleging that would suggest otherwise, calling those allegations "serious and...very damaging to those accused of deception". In those cases the Court concluded, as they did in **Hamilton**, that costs on a solicitor-client basis are appropriate.

[24] Among the allegations made by the Appellant were that Dan Alex Morrison and the Proctor deliberately complicated a simple Estate to increase legal fees for billing purposes. I concluded there was no evidence to support that allegation, and that the size of the Estate is no indication of how complicated it can be. I noted also there was a huge volume of correspondence and insufficient monies to pay the Estate's bills.

[25] The primary issue in the Application was whether the actions of the Executor, in not accepting an undertaking from Kenneth Morrison's solicitor, Mr. McLeod, to pay the Estate expenses, was unreasonable. The Applicant, through his counsel, acknowledged that their entire case turned on this issue.

[26] I concluded that this allegation was also unwarranted. The undertaking being offered was open-ended, and did not provide Dan Alex Morrison with the security he felt he needed, in order to divest the Estate of the property. I found his actions were prudent and wise. He was attempting to honour his mother's wishes. He had been placed in difficult positions throughout by his brother's attempts to control the Estate. I found Dan Alex Morrison to have acted reasonably with all the care and wisdom entrusted upon him by his late mother. In short, none of the numerous and serious allegations made against him by Kenneth Morrison were well-founded or supported by the evidence.

[27] I turn to consider whether the Applicant was aware or had access to information which should have deterred him from making the allegations.

[28] Referring to the various grounds: the provision of a Deed, the timely distribution of assets, and the acceptance of an undertaking were all predicated on there being available, funds placed in trust to retire the debts of the Estate. While the promise of this did occur, the reality of it did not.

[29] A telling feature in the evidence was the attempt by the Applicant to control the sale of the property, something which is within the sole authority of the Executor. The Personal Representative did not wish to have his hands tied (on the sale price), as he was unaware of the ultimate price the market would bring. Most telling was the suggestion by the Applicant that Dan Alex Morrison was seeking to gain personally by selling to a family member at a favourable price. There is no basis in the evidence to support this. In the result, it demonstrates a degree of malice toward the Personal Representative by the Applicant. This touches upon the kind of conduct that an award of solicitor-client would serve to denounce.

[30] In deciding whether to make such an award, I have considered whether the Applicant's position could be credibly argued. Kenneth Morrison, as the Appellant on the Notice of Taxation, was entitled to argue the "*Lunenburg Scale*" on the Appeal, which he did. This was a reasonable argument, even though I did not accept it in the final outcome. I am entitled to use my discretion in the awarding of costs on the Appeal. I have decided I should make one (1) award of costs in relation to both the Appeal and the Application, which were heard together. In doing so, I consider that the Estate was largely the successful party on the Appeal.

[31] But for the so-called "Scale Bill", the remaining fees already fixed were in substance, reasonable and necessary fees, based on time billed, multiplied by an hourly rate. For counsel of the vintage of Mr. Morgan, for the Estate, the hourly rate of \$200.00 is quite acceptable, and more than reasonable.

[32] The fees left to be determined are those from May 4th, 2012 to June 30th, 2012, my having already fixed costs prior to that date, as shown in Appendix "A" (Items 1-4). In addition, the Respondent Estate is claiming additional costs for

court time at \$2,000.00 per day for the two (2) hearing days, pursuant to Tariff “C”.

[33] Exercising my discretion, and doing so judicially, I am satisfied that exceptional circumstances exist in law that permit me to award solicitor-client costs to the Estate. Having regard to all of the circumstances, I am going to temper the award, somewhat.

[34] I hereby direct that the Estate shall have its fees paid from May 3rd to June 30th, 2012 at the rate of 75% of the amount billed, plus disbursements, plus HST. Further, I will allow the sum of \$1,500.00 per day for both days of hearing for a total of \$3,000.00.

[35] My reason for assessing these amounts include the relatively small size of the Estate, the ill-health of the Respondent, and the fact that while the Respondent should have known better than to make these allegations, he apparently did not. Any such reduction is and should not be considered any reflection on the Personal Representative and Proctor’s efforts to settle this matter, in good faith.

[36] It now appears a certainty that the property will be sold to satisfy these and other costs. The ultimate decision will be that of the Executor. I have previously ruled the Executor’s commission at 3% is reasonable, and I hereby affirm same. Hopefully, there will be something left at the end of the day for Mr. Kenneth Morrison, as his mother wished.

[37] Order accordingly.

Murray J.

Appendix "A"

COSTS AWARDED IN ORAL DECISION ON AUGUST 30TH, 2012	
1.	<u>Scale Bill</u> \$975.00 (reduced from \$1,175.00) + \$25.00 + \$1,015.17 (non-taxable disbursements) + \$150.00 (HST) = \$2,165.17
2.	<u>Bill No. 1</u> \$1,612.00 + \$25.00 + \$245.55 (HST) = \$1,882.55
3.	<u>Bill No. 2</u> \$1,744.00 + \$25.00 + \$265.35 (HST) = \$2,034.35
4.	<u>Bill No. 4</u> Legal Fees from Dec. 30 th , 2011 to April 30 th , 2012 - 12.62 hrs. X \$200.00/hour = \$2,524.00 + \$378.60 (HST) = \$2,902.60

COSTS AWARDED BY VIRTUE OF COSTS DECISION	
5.	<u>Legal Fees</u> Legal Fees from May 3 rd , 2012 to June 1, 2012 - 14.91 hrs. X \$200.00/hr. = \$2,982.00 X 75% = \$2,236.50 + \$333.48 (HST) + HST Exempt Disbursements of \$52.37 + HST Taxable Disbursements of \$115.00 (\$100.00 X 15%) = <u>\$2,737.35</u>
6.	<u>Tarriff "C"</u> \$1,500.00/day X 2 days = \$3,000.00
COSTS IN TOTAL	
	<u>\$14,722.02</u>