IN THE COURT OF PROBATE FOR NOVA SCOTIA

Citation: Maskell Estate (Re), 2017 NSSC 325

Date: 2017-12-14
Docket: AM. No. 445899
Registry: Amherst

IN THE ESTATE OF WARREN MASKELL, Deceased

IN THE MATTER OF: The Probate Act of Nova Scotia, 2000 Chapter 31, Section 1

and

IN THE MATTER OF: An Application by Kelli Lovett to interpret the Will of Thomas Warren Maskell, Deceased

and

BETWEEN:

KELLI LOVETT

APPLICANT

and

THE ESTATE OF THOMAS WARREN MASKELL

DEFENDANT

DECISION ON COSTS

Judge:	**The Honourable Justice Jeffrey R. Hunt**
Written Submissions on Costs:	November 15, 2017
Written Decision on Costs:	December 14, 2017
Counsel:	Douglas Livingstone, Solicitor for Kelli Lovett Peter Lederman, Q.C., Solicitor for Thomas Maskell Estate Dianne Paquet, Solicitor for Joanne Baxter

By the Court:

[1] For determination are issues of costs which remain outstanding after the hearing on the merits.

[2] In an oral decision of September 21, 2017, the Court ruled on an issue of interpretation pertaining to the Will of Thomas Maskell.

[3] The intention of the testator was determined and reasons given. Parties were given an opportunity to reach agreement on costs. The Court has been advised this was not possible.

[4] The core issues put before the Court are as follows:

1. What parties are liable in costs?
2. Are costs to be payable personally or from the Estate?
3. Is this a case for solicitor-client costs?
4. If yes – determine quantum.
5. If no – determine tariff, scale and quantum.
6. Disbursements.

Parties Liable

[5] The Estate and Baxter submit that all the potential beneficiaries under the contested clause ought to be exposed to costs. The Applicant says that only Kelli Lovett is liable.

[6] I have carefully examined the arguments of each side. I am not persuaded that it would be appropriate to extend the costs order beyond the named Applicant. Kelli Lovett has been active in the litigation and aware of the potential cost exposure. I am not satisfied this is the case for the others. I do not find the arguments presented to me can overcome my reservations about extending the "costs net" in these circumstances. Accordingly, this Order will determine obligations between:

- The Estate;
- Joanne Baxter who participated in the proceeding as a party;
- Kelli Lovett who participated in the proceeding as a party.

Whether Costs to be Payable Personally

Summary of Applicable Law

[7] 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 as follows:

> 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.

[8] This section does not limit the courts discretion to deal with costs under Civil Procedure Rule 77. Rule 77.02(1) sets out the court's general discretion over this issue, giving the court the power to "at any time, make any order about costs as the judge is satisfied will do justice between the parties". The general rule is that "…costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise": See ***Re Baird Estate***, 2014 NSSC 444.

[9] I have reviewed the recent direction of the Nova Scotia Court of Appeal relating to costs in Probate matters. These cases include ***Prevost Estate v. Prevost Estate,*** 2013 NSCA 20 and ***Casavechia v. Noseworthy***, 2015 NSCA 56.

[10] The Court of Appeal provided additional guidance on these principles in ***Wittenberg v. Wittenberg Estate***, 2015 NSCA 79. Bryson J. A. wrote as follows on the issue of whether litigants will pay personally:

> 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…
>
> 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 as 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.

[11] 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:
>
> > 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.
> >
> > 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.

[12] The dissipation of resources that has been the consequence of this fruitless clash is regrettable. All the litigants have long been on notice that cost consequences were likely to follow the unsuccessful party. Parties were warned not to cling to long abandoned expectations of the past when litigants, successful or not, could turn to the Estate with outstretched hands. Those days are done. Costs in probate cases will now look more and more likes costs in a standard litigation.

[13] I have concluded that costs ordered in this matter will be payable personally by the unsuccessful party as opposed to from the Estate. This is in keeping with the modern trend of probate litigation where the source of the litigation is not reasonably traceable to actions of, or confusion caused, by the Testator.

Solicitor – Client vs. Party – Party Costs

[14] The responding parties seek costs on a solicitor – client basis. The Applicant submits all parties ought to bear their own costs. I rule out the option of having parties bear their own costs. That would not do justice in this situation. The real question is between an assessment on the basis of solicitor – client vs. party – party costs.

[15] Solicitor – client costs are rare in Nova Scotia probate cases. I have examined the positon of the parties and have weighted the arguments including the argument of the successful parties that to adopt the party – party costs regime will in effect punish the Estate and beneficiaries.

[16] I have examined the manner in which the litigation was advanced and the roles of all parties. I am aware, of course, of the change of litigation strategy adopted by Ms. Lovett shortly before the first hearing date.

[17] My view of the controlling legal authorities is that solicitor – client costs ought to be reserved for exceptional and extraordinary circumstances, instances of misconduct or situations calling for denunciation of reprehensible conduct.

[18] I have examined, among others, the following cases:

Brown v. Metropolitan, 150 N.S.R. (2d) 43;
Re Barrican Estate, 2008 NSSC 162 ;
Keddy Estate, 2016 NSSC 194 ;
Keddy Estate, 2017 NSCA 78 ;
Jollimore Estate v. NS, 2012 NSSC 8 ;
Wittenberg v. Wittenberg Estate, 2012 NSCA 79 ;
McCully v. Rogers Estate, 2012 NSSC 435;
Provost v. Provost, 2015 NSSC 10;
Kenny v. Kenny, 2016 NSSC 256.

[19] While I have concluded the litigation was not well founded, I do not conclude it was frivolous or advanced only for a vexatious purpose. I also believe the issue of the change in litigation strategy can be addressed other than by a resort to solicitor – client costs.

[20] Accordingly, costs will be assessed on a party – party basis.

[21] I note that following the recent case of ***Patterson v. Patterson Estate,*** 2017 NSSC 221, the costs order was made on a party – party basis even though there were findings of serious wrongdoing by the unsuccessful party. Even in the face of serious wrongdoing Justice Wright examined the law relating to costs and concluded that party – party costs were the proper basis on which to proceed. The circumstances in ***Patterson v. Patterson Estate*** were more egregious than in the present case.

Quantum of Costs

[22] The Court is aware of the following considerations:

- There was an obvious change in legal approach and strategy by the Applicant mid litigation.
- This resulted in an adjournment of a scheduled hearing and some consequent re-tooling by all parties.
- I disagree with the submission advance by the Applicant that the Executor/Estate ought to have remained neutral in this dispute. There is no such obligation in circumstances such as these.
- I find it is likely that the Executor was initially open to seeking an interpretation. After taking advice he appears to have concluded this was not necessary.
- The Applicant did incur expenses to prepare for a settlement conference which she appeared open to proceeding with. Ultimately the Estate felt it would not be a good use of resources to proceed.
- Counsel to the Applicant argues that I ought to weigh against the Estate the fact that they delivered the Affidavit of Mr. MacNeil (the drafting solicitor) later than it ought to have been delivered. This argument would

have more force if there had been any apparent change in approach after it was filed. No change was evident to the Court. Additionally, the change in legal theory by the Applicant impacted the timing of filings and the decision to file the Affidavit of Mr. MacNeil.

- The Applicant argues that the time spent by Ms. Baxter dealing with issues such as the anonymous call to Service Canada was a distraction from the real issues of the litigation.

- Counsel to the Applicant submits that his client genuinely believed the positon she was advancing. This may be, but the Court has to weigh the objective reasonableness of a party's position as opposed to their degree of personal belief.

[23] I have concluded that Tariff A mid scale is the proper basis on which to proceed. With respect to the "amount involved" I have concluded that the appropriate "band" for calculation purposes is $65,000.00 - $90,000.00.

[24] While the RRSP is said to contain $52,000.00 there is no question that if the interpretation urged by the Applicant had been adopted the scope and breadth of the assets swept up by that interpretation ("any cash, securities, investments" no matter where held) would have ranged beyond the mere RRSP. The door would

have been opened to arguments that other assets and forms of assets fell within the scope of the word “investments” as it appeared in the clause.

[25] I am satisfied that what was being fought over here extended beyond just the RRSP. It had the potential to impact other rights and create other areas for dispute. In terms of the importance of the issues to the parties I am satisfied that the $65,000.00 - $90,000.00 band represents the appropriate range.

[26] There must be some recognition of the mid-course significant change in litigation strategy by the Applicant. This occurred prior to the first scheduled hearing and resulted in loss of time and wasted resources. The Court will deal with this by way of a lump sum augmentation. The lump sum amounts will be different as between the Estate and Ms. Baxter. I have concluded the change in direction, while negative for both Respondents, had greater impact on the responding Estate including the retention of outside counsel.

[27] Applying the scale:

- Payable to the Estate:

$ 9,750.00	Tariff A amount
2,000.00	Day amount
2,500.00	lump sum augmentation
$14,250.00	**Total**

- Payable to Ms. Baxter:

$ 9,750.00	Tariff A amount
2,000.00	Day amount
1,500.00	lump sum augmentation
$13,250.00	**Total**

Disbursements

[28] In addition to the usual claim for disbursements, the Estate has advanced a claim for certain direct costs incurred by the Executor, David Olgivie. These include such things as a flight and lost income. It is suggested that these should be charged back directly against the unsuccessful Applicant.

[29] I refer back to the statement of the Court of Appeal in ***Wittenberg,*** supra, where they stated at para. 99:

> Provided that a personal representative is discharging her duties and is acting reasonably, she can expect to be indemnified by the Estate.

There is no suggestion that Mr. Olgivie has acted other than reasonably. Mr. Olgivie will, in the normal course, have an opportunity to seek certain remuneration and indemnification from the Estate. His expenses ought to be dealt with in that process. I decline to tax them against the Applicant.

[30] In a normal case a litigant, successful or not, cannot advance a claim in costs for things such as lost wages for attending to the litigation. There is no need to depart from the usual practice in this case.

[31] Joanne Baxter has advanced a disbursement claim for $464.00. In addition to the amounts referenced above the Estate has advanced disbursements of $296.00. I have reviewed these claims. For a litigation of this type and duration these are entirely reasonable amounts. I approve these disbursement claims as presented. Accordingly, disbursements are taxed in the amount of $464.00 for Jo-Ann Baxter and $296.00 for the Representative of the Estate.

J.

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