

SUPREME COURT OF NOVA SCOTIA

Citation: *Atlantic Jewish Foundation v. Leventhal Estate*, 2019 NSSC 30

Date: 20190124

Docket: Hfx No. 470775 (H-63083)

Registry: Halifax

Between:

Atlantic Jewish Foundation

Appellant

v.

The Estate of the late Abraham (Abe) Leventhal through its
Executor and Trustee, Alan J. Stern

Respondent

DECISION ON COSTS

Judge: The Honourable Justice Jamie Campbell

Heard: January 10, 2019, in Halifax, Nova Scotia

Counsel: Timothy Matthews Q.C., for the Appellant
Gavin Giles Q.C., for the Respondent

By the Court:

[1] Everything involving the substantial Estate of Abraham (Abe) Leventhal went smoothly until the very end. His executor Alan Stern dealt with things expeditiously and for the benefit of the estate and its beneficiaries. All the legal and accounting fees that were incurred in that process were properly paid out of the estate. Things became contentious when Mr. Stern made his claim for the executor's commission.

[2] Mr. Stern's claim for close to \$900,000 was approved by the Registrar of Probate. The Atlantic Jewish Foundation (AJF) appealed that decision and the amount of the commission was reduced to \$450,000.¹

Issue

[3] The issue now is the costs of that appeal. The main question is whether Mr. Stern should be able to have the legal fees for the appeal paid out of the estate in the same way that fees for legal and accounting services provided for the estate before the dispute about the commission were covered by the estate. While counsel could not provide the amount of those legal fees, counsel for both Mr. Stern and the AJF acknowledged that it would be "a lot". While "a lot" is not a defined term or a term of art, it is safe to assume that when lawyers say "a lot" in reference to legal fees, the amount is not a pittance.

[4] If the estate does pay those fees then, in the end the AJF will be paying for their own lawyer and for Mr. Stern's lawyer in an appeal in which they were the successful party and he was seeking a commission that would go to him, personally. That would be, to use Justice Bryson's turn of phrase, an indirect charge on the generosity of the testator.² It runs counter to the general rule that the successful parties should recover their costs. If, however the estate does not pay those fees, and Mr. Stern is left to pay them personally, he will be paying for actions in the name of the estate, in responding to the appeal brought by the AJF. That runs counter to the rule that the professional fees incurred by the executor for the estate are paid out of the estate.

¹ *Atlantic Jewish Foundation v. Leventhal Estate* 2018 NSSC 297

² *Wittenberg v. Wittenberg Estate* 2015 NSCA 79, para. 100

Summary

[5] Legal and other professional fees incurred in dealing with an estate are paid out of the estate. That is the case even if the executor is one of, or even the only person, who may derive a benefit from that expenditure. The fees must be incurred reasonably to determine and respect the wishes of the testator who made the will. An executor should not be required to put personal money at risk to engage in litigation with that purpose and should not lose personal money if the position he has taken turns out to have been wrong or at least to have been not accepted by a court provided it is not entirely unreasonable. Mr. Stern in this case made a claim for a maximum 5% commission. His actions in fulfilling the obligations as executor of the estate were wise and prudent, and unquestionably to the benefit of the estate. That claim was accepted by the Registrar of Probate. His position in seeking to have the decision upheld was not so unreasonable as to disentitle him to have the legal fees in that dispute paid from the estate. The decision to reduce the commission payable was not based on any failure on Mr. Stern's part.

The Traditional Rule

[6] The traditional English rule was that the costs of all parties to litigation were paid from the estate if the dispute arose from an ambiguity or omission in the will or other conduct by the person who made the will, or if there were reasonable grounds to contest the validity of the will. As the Ontario Court of Appeal noted in *McDougald Estate v. Gooderham*³, such cost awards had become “virtually automatic”. That meant that parties who contested the will would recover their costs from the estate, and the executor, who defended or propounded the will, would of course, also have costs covered by the estate. That offered little by way of an incentive to avoid unnecessary estate litigation. The development of a modern approach to costs in estate litigation has meant that cases have addressed several aspects of the traditional rule and its implications. It is important to distinguish between cases that address the concern about the ability of third parties to be paid out of the estate and the law that legal fees incurred by the executor in dealing with the estate are paid out of the estate.

The Modern Approach

³ [2005] O.J. No. 2432

[7] The days of the traditional rule are gone. The modern approach is to “carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation.”⁴ Those public policy considerations are, the importance of giving effect to valid wills that reflect the intent of competent testators, the public interest in allowing reasonable questions to be raised about the testator’s competence without cost to those who raise those questions, and appropriateness of having the estate bear the cost where ambiguities arise from the actions of the testator.

[8] Many cases involve claims for costs by those who challenge the validity of wills. The Nova Scotia Court of Appeal in *Wittenberg Estate* adopted the modern approach taken in Ontario. The court noted the distinction as it relates to costs between the personal representative and adverse parties.

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.⁵

[9] In *Wittenberg Estate*, the son who claimed that his mother lacked testamentary capacity was not successful at trial. He appealed and was not successful on appeal. While the presence of suspicious circumstances might relieve a party from costs those suspicions were readily dispelled. There was no foundation to the claim that he made. He was required to pay costs to the estate.

[10] Clearly, parties to estate litigation cannot assume that their costs will be paid out of the estate. When a litigant challenges testamentary capacity on grounds that are unreasonable and persists irresponsibly in that litigation, he will not have costs from the estate but will be required to pay costs to the estate.⁶

Executors

⁴ *McDougald Estate*, para. 80

⁵ *Wittenberg Estate*, para. 99

⁶ *Marshall Estate (Re)* (1998), 50 O.T.C. 357 (Gen. Div.), *Gamble v. McCormick* (2002), 4 E.T.R. (3d) 209 (S.C.J.)

[11] But the executor is different. Executors are indemnified from the estate when discharging their duties and acting reasonably. Personal representatives should have the ability to act reasonably within their discretion to take and respond to legal actions on behalf of the estate without the concern they will be ordered to bear responsibility for the legal fees involved. There may of course be cases where the actions taken by a personal representative are so improvident, and so “unnecessary and ill-advised” that they should be required to bear their own costs or some portion of those costs.⁷ If executors were at risk of incurring personal liability for substantial legal fees, issues that should be litigated might not be or perhaps few would agree to take on such a responsibility. An executor should be able to argue that the testamentary capacity of the testator be confirmed against an adverse claimant without the concern that he will be personally responsible for legal fees incurred if the defense fails. There are sound reasons for executors to have reasonable assurances that their expenses will be paid by the estate.

[12] The potential that the executor might also share personally in the benefit from that litigation does not change the policy consideration for the rule or the general application of the rule. An executor should not have to assess the potential for personal liability when instructing counsel involved in taking a position which might favour some beneficiaries, even when he is included in that group. Even if the executor is the only beneficiary who would benefit from the litigation, there is no rule that would displace the general one that an executor is indemnified from the estate when acting reasonably and in the capacity as executor. The executor in that case should be indemnified for legal costs from the estate. The issue is whether the executor took the action in the capacity as executor and acted reasonably in doing so. Personal benefit or the potential for personal benefit is not a bar to indemnification.

Litigation Regarding Executors’ Commissions

[13] The issue of the executor’s commission might be distinguished from other estate litigation. It is a situation in which the executor stands to benefit personally from a favourable outcome, not as a member of a class of beneficiaries or as single beneficiary under the terms of the will. In making such a claim however, the executor is still acting as the personal representative of the testator, who is entitled by the appointment as executor to advance that claim. Properly making that claim

⁷ *Montreal Trust Co. of Canada v. James* (1985), 19 E.T.R. 135 (B.C.S.C.), *Legge Estate (Re)* 2007 NSSC 53

is one of the activities that is associated with the appointment as executor. The person when making that claim does not step out of the office of executor and begin acting in a personal capacity in some way in conflict with the interests of the estate. The claim is put forward to the Registrar of Probate and is approved in the amount set by the Registrar.

[14] An executor's actions in advancing the claim for commission can descend to the point of being so ill-advised, improvident and unreasonable that he should be disentitled to recovery of legal fees from the estate.

The Litigation in this Case

[15] That is not at all what happened here.

[16] Mr. Stern as the executor advanced his claim for the maximum commission to the Registrar of Probate. There would be no debate that he was acting in his capacity as executor when doing that. The Registrar accepted the claim and authorized the payment of the full amount claimed. To that point Mr. Stern had done nothing wrong at all and had acted properly as the executor of the estate. The AJF appealed the Registrar's ruling. The appeal was not against Alan Stern in his personal capacity. The appeal was properly against the ruling of the Registrar, naming the estate as the responding party. With the Registrar's ruling in hand, Mr. Stern did not act unreasonably in contesting the appeal on behalf of the estate. He was the only potential beneficiary of the decision to respond to the appeal, but he was responding to the appeal on behalf of the estate. In doing so he did not act in a way that was so unreasonable that he should be disentitled to the benefit of the normal rule that fees incurred by the executor in dealing with the estate are paid by the estate. The result of the appeal was a substantial reduction of the amount of the commission authorized. That conclusion was in no way an adverse comment on the service that Mr. Stern had provided to the estate.

[17] That can be contrasted to a situation in which the executor advanced a claim for commission that was denied because the executor had not performed to a reasonable standard. The executor who then persisted and expended a substantial portion of the value of the estate in legal fees pursuing an ultimately doomed attempt to increase his commission, should not expect to have the estate fund that self-serving personal project.

[18] Mr. Stern's reasonable legal fees should be paid from the estate. That is an indirect charge on the successful litigant, the residuary beneficiary. That said

however, counsels' reference to the size of the legal bill as "a lot" does not provide enough detail at this stage. The matter has already been before the Registrar who approved all accounts paid out of the estate, including legal fees to that date. The court, in this appeal, is the last line of approval to protect the interests of the residuary beneficiary. That account should be submitted to the court for review and final approval.

Party-party costs

[19] Given that all reasonable legal costs will be paid by the estate in any event, the issue of the payment of party-party costs amounts to a practically moot issue. There has already been an order for costs made in the course of a preliminary motion. Those costs should be paid out of the estate and not by Mr. Stern personally.

[20] In the circumstances of this case no further award of costs should be made. The AJF, as the successful party would receive costs from the estate which would reduce, dollar for dollar the amount of the bequest that it will receive.

Campbell, J.