SUPREME COURT OF NOVA SCOTIA
Citation: *Devlin Estate (Re)*, 2020 NSSC 77

Date: 20200227
Docket: SBW No. 493217
Registry: Bridgewater

In the Probate Court of Nova Scotia

In the Matter of the Estate of Michael John Devlin, deceased

Decision on Security for Costs

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	February 10, 2020, in Halifax, Nova Scotia
Date:	February 27, 2020
Counsel:	Andrew Christofi, for Catherine R. Summerfield Melissa MacKay and Shannon Ingraham, for the Public Trustee
Parties not appearing:	John Hensley on his own, Hazel Rigby on her own, and The Canadian Cancer Society and The Arthritis Society represented by Richard Norman

Moir, J.:

Introduction

[1] Catherine Summerfield seeks to prove in solemn form a document alleged to be the holographic will of Michael Devlin. There are four specific gifts of $10,000 each and the rest is left to Ms. Summerfield. Two people identified by Ms. Summerfield as next-of-kin of Mr. Devlin filed notices of objection.

[2] The document is lost. We have a coloured reproduction made by a printer and a photograph taken by a smart phone.

[3] As is common these days, the Registrar of Probate referred the proof in solemn form to ordinary chambers. (Applications in ordinary chambers are heard in a half hour or less.) Justice Robertson heard one of the objecting parties and determined to request the Public Trustee consider participation. The proof was adjourned to March 5, 2020 in ordinary chambers at Bridgewater before Justice Lynch.

[4] In the meantime, Ms. Summerfield made a motion in chambers at Halifax for an order for security for costs against one of the objecting parties. This decision determines that motion.

The Alleged Will and the Contest

[5] The document is dated October 4, 2018. Mr. Devlin died on May 2, 2019. A month later, Ms. Summerfield sought a grant of probate on proof in common form. A copy of a will cannot be proved that way. So, Ms. Summerfield filed an application for proof in solemn form, and she sent notices to various people including next-of-kin.

[6] Mr. John Hensley was notified. He is Mr. Devlin's first cousin and would inherit on an intestacy if the alleged will and previous ones fail. He lives in Uxbridge, England.

[7] Mr. Hensley filed a notice of objection. Among other things, Mr. Hensley contests the validity of the document. He produces alleged samples of Mr. Devlin's handwriting. He says his cousin made wills in February 2016 and May 2018 and contrasts the circumstances under which those documents were executed

with the alleged holographic will. He refers to his cousin's recent behaviour as showing incapacity. He alleges all his cousin's personal property was taken away, and he complains Ms. Summerfield misrepresented herself as Mr. Delvin's next-of-kin.

[8] Ms. Hazel Rigby of Eastleigh, England was thought to be a first cousin of Mr. Devlin. She was notified. She says she is not a cousin, but she filed a notice of objection anyway and supplied a sample of what she says is Mr. Devlin's handwriting.

[9] Ms. Summerfield filed an affidavit for the proof in solemn form. It shows that Mr. Devlin bought his home at Blue Rocks in 2005, without a mortgage. It had an assessed value of $140,000. He lived there alone.

[10] Ms. Summerfield swore, "The estate is bound by an agreement of purchase and sale in respect to the house". She does not explain. She does not exhibit a copy of the agreement. She also swears, "My life is basically on hold until the sale of the house goes through".

[11] Ms. Summerfield says she does not know where the alleged will was written. Mr. Devlin was a friend who kept up a correspondence with her. One day, the will showed up where she was living temporarily in Vancouver. Mr. Devlin was in Lunenburg County.

[12] Ms. Summerfield and Mr. Devlin never discussed the holographic will or his intentions for making it.

[13] Ms. Summerfield got the will notarized in British Columbia about a month after Mr. Devlin died. That is how we have the printer copy. The notary attached it to Ms. Summerfield's affidavit. Ms. Summerfield sent the original of the documents, her affidavit, and an application for proof in common form to her counsel.

[14] Mr. Christofi supplied an affidavit. It indicates that the original holographic will got lost in his office.

[15] Ms. Summerfield exhibited five alleged samples of Mr. Devlin's writing. Each is a letter to her.

The Submission for Ms. Summerfield

[16] Ms. Summerfield says that "Mr. Hensley resides in England" and "He has no prospect of receiving any bequest from the estate."

[17] She relies on s. 67(i) of the regulations, which empowers a Registrar who hears an application under Part IV- Contentious Matters to "order that security for costs be given by any party." Proof in solemn form must be brought before a judge, not the Registrar, unless all parties consent: *Probate Act*, s. 97 (2)(a).

[18] Ms. Summerfield suggests that sections 99(2) and 100 of the *Probate Act* extend the Registrar's statutory power to order security for costs to a judge. However, s. 99(2) only says that a Registrar may transfer an application to a judge and s. 100 only says that judges and registrars hearing applications may "exercise the powers and functions of the court".

[19] Ms. Summerfield relies on the grounds for ordering security for costs in Rule 45.02(1) as amplified or explained in *Aliant Inc. v. Ellph.com Solutions Inc.* 2012 NSCA 89, and the decision under appeal in that case, 2011 NSSC 316.

[20] She also relies on the rebuttable presumption in Rule 45.02(3) that applies where "the party making the claim is ordinarily resident outside Nova Scotia". Mr. Hensley's residence in England is presumed to give rise to the threshold for security for costs in Rule 45.02.

[21] However, the order is discretionary even if the threshold is met. Ultimately, the judge has to consider fairness and justice. In that connection, Ms. Summerfield submits as follows:

> Ms. Summerfield was housekeeper, driver, personal caregiver and surety for the deceased in the last year and a half of his life, who was living with bipolar disorder.
>
> Ms. Summerfield had no knowledge of the deceased's last will until she received it in the mail. She never asked the deceased to be the executor or a beneficiary of his estate. The estate currently has no liquid funds for her to use to continue administering the estate. There is a small portion of the funeral bill which must be paid first. She has incurred costs relating to the funeral, bonding and legal fees. Her interim legal bill is almost $17,000, and some of these costs are due to Mr. Hensley's shenanigans. Some of the other fees associated with the estate have been paid for by third parties because of Ms. Summerfield's impecuniosity, and the estate will be required to reimburse said third parties. She has discharged

> the duties she would have as an administrator but will be unable to exercise her rights as administrator until the Court issues the grant.
>
> John Hensley is the only one standing in the way of Ms. Summerfield acquiring these rights. Hazel Rigby has not perfected her objection and is not entitled to further notice in these proceedings. There are no other objections to the application. All other interested parties take no position.

[22] Ms. Summerfield's affidavit amplifies. She provides details on her assistance to Mr. Devlin in his last years. This evidence also reveals that Mr. Devlin suffered from bipolar disorder, that he often found himself in jail, that he had alienated many members of the Lunenburg community, and that he was banned from the local shopping mall and other businesses.

[23] Ms. Summerfield also gives evidence about work done for the estate by her friend, Mr. Robert Demone. This evidence makes it clear that Mr. Devlin lived in squalor at the end of his life.

Meaning of Proof in Solemn Form

[24] The distinction between common form and solemn form may be less clear since *Probate Act*, S.N.S. 2000, c. 31 and *Probate Court Practice, Procedure and Forms Regulations,* N.S. Reg. 119/2001 as amended.

[25] The *Probate Act*, R.S.N.S. 1984, c. 359, and its predecessors of a century or more, left the conduct of a proof in solemn form to the judges. Some would say, to the common law. Does the legislation of 2000 and 2001 justify the looser approach evident in referrals to ordinary chambers and the submission for Ms. Summerfield?

[26] We will consider the practice before the new legislation, the express provisions, and the background that illuminates interpretation. The background to the new statute and regulations consists in the historical characteristics of a hearing of a proof in solemn form and what a judge must decide on such a hearing.

[27] The distinction between common form and solemn form used to be clear. Less so, since *Probate Act*, S.N.S. 2000, c.31 and *Probate Court Practice, Procedure and Forms Regulations*, N.S. Reg. 119/2001 as amended.

[28] Absent a question about the validity of a will, and absent a citation by next-of-kin or other interested parties, a will could be proved in common form. All that was required was a petition by the executors, the inventory prepared by the

executors, and an affidavit of one of the witnesses: James MacKenzie, *Feeney's Canadian Law of Wills 4th ed.* looseleaf (Markham, LexisNexis, 2019) para. 712.

[29] Solemn form required a trial on notice to all interested parties "including persons who would be interested on an intestacy": *Feeney*, para. 7.21. *An ex parte* trial was held when no one objected or no one showed up: same para. in *Feeney*.

[30] Otherwise a party could deny valid execution, put capacity in issue, allege fraud, or "simply limit the appearance to an insistence on the party's right to cross-examine …". *Feeney*, para. 7.21.

[31] Now, the statute leaves proof in common form to the regulations: s. 30(2). The affidavit is to be "in the prescribed form". It must prove "such facts and information as are prescribed".

[32] Proof in solemn form is the subject of s. 31(1). It begins, "A court may hear a will proved in solemn form …". The word "hear" suggests testimony, unless we are going back to the days when affidavits were read aloud in open court. The full text of s. 31(1) reads:

> A court may hear a will proved in solemn form and determine the validity of the will where an application asking the court to do so is made by a person interested in the estate of the testator either before or after a grant is made with respect to the will but not after the expiration of six months from the grant.

Subsection 31(2) allows for extending the six month limitation period.

[33] In addition to the subordinate legislation authorized by s. 30 for proof in common form, s. 106(1)(a)(ii) allows the Governor-in-Council to:

> (a) make rules of Court …
>
> > (ii) regulating the practice and procedure in courts, including the manner in which applications are made and evidence is taken and facts and documents are proved.

[34] When hearing applications generally the Registrar of Probate may "receive evidence by affidavit or orally", s. 67(a); "direct a hearing of issues … and the procedure to be followed", s. 67(c); "order that security for costs be given by any party", s. 67(i); or "order that costs be paid from the estate or by a person who is a party to the application", s. 67(j). These powers of the Registrar are created "without limiting the powers of the court" s. 67.

[35] Proof in solemn form falls under "Contentious Matters": s. 63. Forms for contentious applications are prescribed in s. 64. And, s. 66 prescribes notices of objection. A person who does not file an objection loses entitlement to further notice and needs permission of a judge to make representations at the hearing: s. 66(2).

[36] The forms are for use in all kinds of contentious applications, not especially an application for proof in common form. The prescribed form for general notices of application is Form 45. It contains a warning "If you do not come to the hearing in person or as represented by your lawyer, the court may give the applicant what they want in your absence". Although this warning has no substantive support in the regulations, Ms. Summerfield seems to rely on it to deprive Ms. Rigby of notice of the adjourned application.

[37] The regulations turn to the specific application that concerns us, the application for proof in solemn form, at s. 69 and s. 71.

[38] Section 69(1) requires:

> If an original will is lost or destroyed, the validity and content of the will shall be proved in accordance with Section 31 of the Act upon an application for proof in solemn form, unless the court otherwise orders.

[39] Subsection 71(1) incorporates the Form 45, which is suitable to general applications, for applications for proof in solemn form. This includes the unsupported warning about default of appearance.

[40] Section 71 contains twelve subsections providing some procedural detail. Subsection 71(9) appears to allow the judge to proceed summarily on an uncontested application for proof in solemn form. However, neither the statute nor the regulations tell us how a judge is to "hear" a contested proof in solemn form.

[41] Let us consider the historical proof in solemn form and what a judge had to decide in such a proceeding before determining the present requirements. These subjects provide necessary background for interpreting the new provisions.

[42] The history can be seen in Ch. XXVI, "Calling in and Revoking Probate", *Modern Probate of Wills* (1846, Boston, Little & Brown). The two forms of proof derive from the English ecclesiastical courts.

[43] At p. 391, the Little & Brown text says:

> Where no controversy is apprehended as to the validity of the instrument, the common form is pursued, and is, therefore, the form most generally used in England, and is after the following manner. The executor, without citing the next of kin, takes the will of the deceased and the inventory and presents them before the judge, or his surrogate, of the ecclesiastical court, where it should be proved, and proves by the oaths of witnesses that the will is the true last will of the deceased.

However, a grant of probate based on proof in common form was not binding on next-of-kin or other potentially interested parties.

[44] The Little & Brown text says at p. 392:

> In the *solemn form*, the next of kin of the testator must be cited *to see the proceedings.* When the will is presented in court for probate, the witnesses are examined severally and secretly, and their testimony is committed to writing and then made public.

[45] Stuart Cunningham Macaskie, *The Law of Executors and Administrators* (1881, London, Stevens and Sons) introduces Chapter V "Of Proving the Will" with "Anciently wills were proved in the Ecclesiastical Courts." (p.29). "Wills are proved in common form, where there is no dispute as to the probate, or in solemn form … where there is a dispute, or likelihood of dispute." (p. 31).

[46] Probate obtained by proof in common form is not conclusive: p. 32. An interested party may require proof in solemn form or the executor may go that route in the beginning, p. 32-33.

[47] Mr. Macaskie says at p. 33-34:

> The old method of proof in solemn form was to summon all persons wo would be interested in the will being pronounced against, and to have witnesses examined, and cross-examined as to the will and its execution, whereupon probate was granted or refused. Now the matter proceeds much as any other action under the Judicature Acts, with statements of claim and defence…, for the pleadings. Persons, not parties to the cause, but interested, may intervene with the leave of the Court.

[48] Since the introduction of an application for proof in solemn form twenty years ago, some contested wills have been proved by affidavit and cross-examination. See for example, *Casavechia Estate*, 2014 NSSC 73 (McDougall, J.) upheld 2015 NSCA 56; *Kenny v. Kenny Estate*, 2016 NSSC 214 (Pickup, J.), and *Villeneuve v. MacPherson Estate***,** 2019 NSSC 88 (Norton, J.).

[49] Some have been determined by trial: *Ramsay Estate*, 2004 NSSC 140 (Wright, J.) and *Fawson Estate***,** 2012 NSSC 55 (Hood, J.).

[50] *Willis Estate***,** 2009 NSSC 231 (Murphy, J.) is an example of a hybrid. Direct evidence was introduced by affidavit of some witnesses and testimony of others.

[51] Before the new legislation, proof in solemn form was usually by trial. See for example, *Brownhill Estate*, [1986] N.S.J. 413 (O'Hearn, Co. Ct. J.); *Little Estate,* [1998] N.S.J. 285 (Davison, J.), and *Murphy Estate,* [1998] N.S.J. 371 (Hall, J.).

[52] I turn from the history of proof in solemn form to what must be proved. The controlling authority is *Vout v. Hay*, [1995] 2 S.C.R. 876. Justice Sopinka wrote for the court.

[53] The proponent of the will has to prove, on a balance of probabilities, that the formalities for execution were complied with (para. 19). In the case of an alleged holographic will, the requirement is for proof that the writing embodies "the testamentary intentions of the deceased": s. 8A(a) of the *Wills Act*, R.S.N.S. 1984, c. 505 as amended by S.N.S. 2006, c. 49.

[54] The proponent also has to prove "that the testator knew and approved of the contents of the will": also para. 19 of *Vout*.

[55] Thirdly, the proponent has to prove testamentary capacity. That is to say "the testator had a disposing mind and memory": para. 20 of *Vout*.

[56] Finally, an opponent of a will proven as required under the first three principles bears the onus to establish fraud or undue influence: para 21. However, proof of suspicious circumstances may negative knowledge and approval or, as well, testamentary capacity: para. 27 of *Vout*.

[57] In my assessment, the *Probate Act* of 2000 and the *Probate Court Practice, Procedures and Forms Regulations* of 2001 do not loosen the procedural rights of next-of-kin and they do not water down the substantive requirements on a proof in solemn form. Nothing in the language of the statute or the regulations changes the substantive requirements set by the Supreme Court in *Vout*. Ms. Summerfield bears the onus of proving:

- The alleged holographic will embodies the testamentary intentions of Mr. Devlin;

- Mr. Devlin knew and approved of the contents;
- Mr. Devlin had testamentary capacity in the sense of "a disposing mind and memory".

[58] The legislation does make changes to the procedure for hearing a proof in solemn form, but without diminishing the procedural rights of parties.

[59] Instead of the ancient hearing in the ecclesiastical courts or the later trial of an action as described by Mr. Macaskie, the present legislation calls for an application. This evokes Rule 6.01 of Rule 6 – Choosing Between Action and Application. However, a judge can convert the application and order a trial under Rule 6.03.

[60] Rule 5 – Application makes it clear that the practice of referring a contested application for proof in solemn form to chambers is wrong. Both the history of proof in solemn form and the substantive requirements needing proof by the proponent of the will show that the application is inconsistent with Rules 5.01(3), 5.05(1), and 5.05(2). No language in the statute or the regulations suggests otherwise.

[61] A contested application for proof in solemn form has to be treated as an application in court. It should be directed and set for hearing only on the quality of information demanded for a motion for directions under Rule 5.13.

[62] Why does all of this matter on a motion for security for costs? First, because proof in solemn form invites next-of-kin and other potential beneficiaries into a hearing so they may become bound by the alleged will. This is why invited parties who fail in opposition may be treated differently in the law of costs. It also explains reluctance to order security for costs against opposing parties, a subject I will discuss further on.

[63] Secondly, the information obtained through the motion for directions will afford the judge details that are important to exercising the discretion. In the meantime, we are in the dark on at least the following:

1) Will the public trustee participate?
2) Does Mr. Hensley wish to participate by remote means?
3) Will he or Ms. Rigby give evidence about writing samples by video conference under Rules 51.08, 53.02, 53.05 and 56.03?

4) What evidence is to be offered as to testamentary capacity?

5) Are witnesses available other than the person who stands to gain from the will?
6) If none are to be called by the parties, will the judge call the witnesses under Rule 51.14?
7) What became of the personal property? Is it available to assist with the expense of further evidence?

Costs and Proof in Solemn Form

[64] Unsuccessful opponents of an alleged will are in a peculiar position regarding costs. At one time, they were almost never ordered to pay costs, and they often recovered costs. Even today, judges depart from the usual rule that the unsuccessful party pays costs to the successful one. There is a public interest in requiring proof of wills.

[65] The subject was discussed in detail starting at para. 90 of *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79. At para. 99, Justice Bryson concludes:

> 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… .

[66] The unusual approach to costs on proof in solemn form militates against exercising the court's discretion to order security for costs. At para. 12 of *Ortigoza v. Thorsnes*, [2001] M.J. 148 (Q.B.) Master Sharp wrote:

> It would appear, therefore, that although the court has a discretion to award security for costs, there has been a general practice not to exercise this discretion, for obvious practical reasons and out of consideration of public policy, in situations involving the proving of a will in solemn form.

[67] In my view, the general practice described by Master Sharp in Manitoba should be followed in Nova Scotia.

Conclusion

[68] The motion for security for costs is dismissed. I leave costs of the motion to the judge who hears the proof in solemn form.

J.