SUPREME COURT OF NOVA SCOTIA
Citation: *Jackson Estate v. Young*, 2020 NSSC 136

Date: 20200506
Docket: 478993
Registry: Pictou

Between:

Estate of Judith Marie Jackson , as represented by Laura Beth Kelly & Sarah Jillian Barnes in their capacities as Administrators of the Estate

Applicant

v.

Bill Young

Respondent

Decision on Costs

Judge:	The Honourable Justice Glen G. McDougall
Heard:	June 10, 2019, in Pictou, Nova Scotia
Counsel:	Daniel Boyle, for the Applicant Roseanne Skoke, for the Defendant Jeremy Smith, for the Attorney General of Nova Scotia

By the Court:

Background

[1] On August 2, 2018, Ms. Kelly and Ms. Barnes, on behalf of the Estate of Judith Marie Jackson, filed an application in the Supreme Court for an order requiring Mr. Young to vacate the property at 327 Craig Road in Watervale, Nova Scotia and to pay occupation rent from August, 2017 to present and costs.

[2] Mr. Young filed a Notice of Contest and a Notice of Respondent's Claim on August 14, 2018. He also caused to be filed a Notice of Claim in Probate Court for the County of Pictou on the same date.

[3] Mr. Young took the position that he is a "spouse" for the purposes of the *Intestate Succession Act*, R.S.N.S. 1989, c. 236, and is therefore entitled to inherit the property that was registered in the name of Judith Marie Jackson who died intestate on August 26, 2017. At the time of her death, Ms. Jackson was living in a common law relationship with Mr. Young.

[4] In the alternative, counsel for Mr. Young argued that the exclusion of common law spouses under the *Intestate Succession Act* infringes Section 15, subsection (1) of the *Canadian Charter of Rights and Freedoms* and was therefore

unconstitutional and could not be saved by Section 1. A Notice of Constitutional Question was filed on his behalf on February 19, 2019.

[5] As a further alternative argument, Mr. Young claimed that he had an equitable interest in the property under the doctrine of unjust enrichment or proprietary estoppel.

[6] In a written decision dated January 7, 2020, the Court found that the exclusion of common law spouses from inheriting under the *Intestate Succession Act* infringes s. 15(1) of the *Charter* but is justified under s. 1. Absent a finding that the exclusion is unconstitutional, it is left to the Legislature to amend the definition should it decide to do so.

[7] The Court also dismissed Mr. Young's claim to an equitable interest in the property and ordered that he vacate it within 90 days of the release of my decision.

[8] The Estate's claim for occupation rent was also dismissed. And, since the parties agreed that the issues in this proceeding mirrored those raised by Mr. Young in his Notice of Claim in the Probate Court, that claim was similarly dismissed.

[9] It was left to the parties to try to reach an agreement on costs. This, they failed to do, and so it is left to me to decide what the appropriate cost award should be.

Position of the Parties:

1 – Applicant:

[10] The Applicant Estate, as represented by the Personal Representatives, seeks costs of $24,000.00 plus disbursements of $704.94.

[11] Counsel for the Personal Representatives, Mr. Boyle, set out the procedural history of the proceeding that involved two separate court appearances before the matter was initially set down for hearing before me in March of 2019. Three days were scheduled with the understanding that a Notice of Constitutional Question would be filed and served on the Attorney General sufficiently in advance of the scheduled hearing to give the Attorney General's legal representative time to adequately prepare. Unfortunately, the Notice of Constitutional Question was not filed until February 19, 2019, which led to an adjournment of approximately two months. The hearing commenced on May 27 and continued on May 28, 29 and June 10, 2019 – a total of four days. Post-hearing submissions were also requested by the Court.

[12] In support of the costs award sought by the Estate's Personal Representatives, Mr. Boyle filed an affidavit that included copies of accounts rendered by his Firm beginning on October 13, 2017 and ending on January 27, 2020. The legal fees billed total $31,169.00 (pre-tax) which is net of a $4,455.01 reduction. Also included in this amount is $3,810.00 for fees billed by one of the other lawyers in Mr. Boyle's Firm pertaining to the administration of the Estate which, according to Mr. Boyle's affidavit, "…would most likely have been incurred…regardless of associated litigation." (See para. 8 of Mr. Boyle's affidavit sworn on February 10, 2020 and filed on February 11, 2020.) In all, the Estate has been billed close to $37,000.00 for legal fees, HST, and disbursements.

[13] According to Mr. Boyle an award of costs in the amount of $24,000.00 (which includes tax but not disbursements) would amount to approximately 67% of the total legal fees and taxes billed thus far.

[14] He further pointed out that his clients were successful in achieving the results they were looking for except for the payment of occupation rent.

[15] In arriving at the figure of $24,000.00 (plus disbursements), Mr. Boyle applies Tariff C. At the rate of $2,000.00 per day and taking into consideration the parties prior appearances before Justice Patrick Murray and Justice Suzanne Hood

to have a preliminary issue determined and to schedule the hearing before me, Mr. Boyle submits that a multiplier of 3 should be used to increase the amount of $8,000.00 (i.e. $2,000.00/day x 4 days) to $24,000.00. The 3 times multiplier, he argues, takes into consideration the:

1. Complexity of the matter;
2. The importance of the matter to the parties; and
3. The amount of effort involved in preparing for and conducting the application.

2 – Respondent:

[16] Counsel for the Respondent, Ms. Skoke, suggests that each party should bear their own costs. She, too, points out the importance of the matters to her client as well as the public interest involved in challenging the constitutionality of the definition of spouse in the *Intestate Succession Act*. Mr. Young was fighting to remain living in the house that he had been residing in along Ms. Jackson for upwards of ten years prior to her death. The property was acquired by Ms. Jackson as part of a division of matrimonial property when she and her first husband got divorced.

[17] Ms. Skoke attached a copy of her client's 2019 T4A which shows Canada Pension benefits totalling $5,588.00. This was not attached to a sworn affidavit nor is there anything to state that this reflects Mr. Young's total 2019 income, from all sources. The Statement of Canada Pension Plan Benefits indicates that the "Number of months – retirement" was 4 months. It also shows that the $5,588.00 is comprised of:

1. Retirement Benefit - $1,491.76

2. Survivor Benefit - $4,096.24

[18] Without a sworn affidavit providing confirmation that this reflects his income from all sources along with an explanation of just what this CPP benefit is made up of, it has no evidentiary value.

[19] Despite this, I acknowledge what Mr. Young's counsel asserts in her written submissions. An award of costs against Mr. Young would likely create a financial hardship for him. I do not however, accept her contention that he could not financially bear it.

[20] Ms. Skoke also suggests that the Court in its discretion could order costs for both parties out of the assets of the Estate. That would likely require the Estate to

sell the Watervale property since it is the only significant asset owned by the Estate.

[21] Should this occur, there would probably be nothing left to distribute to Ms. Jackson's two surviving heirs. In the meantime, Mr. Young would have enjoyed the benefit of living in the premises for in excess of two and one-half years, rent free. In the circumstances of this case, it would be fundamentally unfair to expect the Estate's residuary beneficiaries to bear the entire cost of the litigation.

Discussion:

[22] Although the dispute came before me by way of an Application in Chambers in the Supreme Court, the parties agreed that the Notice of Claim brought by Mr. Young in the Court of Probate, in effect, dealt with the same issues. Section 92 of the *Probate Act*, S.N.S. 2000, c. 31, pertains to costs in contested matters:

> Costs in contested matters
>
> **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.
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> **(2)** An order made pursuant to subsection (1) may be reviewed by the Nova Scotia Court of Appeal or any judge thereof in chambers, upon notice given in the prescribed manner and form by the party aggrieved to the opposite party, and such order may be made thereon as the Court or the judge considers just and proper.

> **(3)** An order for the costs of an application may be made personally against a personal representative where the application is made as the result of the personal representative failing to carry out any duty imposed on the personal representative by this Act.
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> **(4)** An order for costs in an application may be made personally against a personal representative who has made the application where the application is frivolous or vexatious. 2000, c. 31, s. 92.

[23] In *Kenny Estate (Re)*, 2016 NSSC 256, the Honourable Justice Arthur W.D. Pickup, formerly of this court, at para. 4, referred to the interplay of Section 92 of the Probate Act with Civil Procedure Rule 77:

> [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).

[24] Justice Pickup relied heavily on the words of the Honourable Justice Peter M.S. Bryson, in the case of *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79. At paras. 6, 7 and 8 of *Re Kenny Estate*, Justice Pickup stated the following in borrowing from what the Nova Scotia Court of Appeal said in *Wittenberg v. Wittenberg Estate*:

> [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]
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> 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...

[Emphasis added]

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.

[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:

> 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.

Court's Ruling:

[25] In the case that came before me, there was no dispute over the interpretation of a Will nor was there any allegation of incapacity on the part of a testator or the exercise of undue influence or coercion in the process of giving instructions for the drafting of a Last Will and Testament. Ms. Jackson had no Will. She died intestate. A great number of people die in similar circumstances. There is existing legislation to deal with these unfortunate situations. The *Intestate Succession Act* was created for that very purpose. It has been tried and tested on countless occasions. Is it in need of an overhaul to take into account common law relationships? Such relationships are not a new phenomenon. Are they increasing in number? I have no way of knowing the answer to this question. There could be statistical evidence somewhere and, if there is, perhaps it will be considered by our elected representatives at the Nova Scotia Legislature if they, in their collective wisdom, should, someday, decide to amend the existing statutory regime.

[26] Based on the way this case has played out before me and given the considerable discretion made available to me, when deciding costs, I believe the appropriate award of costs should be a lump sum amount of $10,000.00 payable to the Estate of Judith Marie Jackson by the Respondent, William "Bill" Young. Mr.

Young will have one year from the date of this decision (on costs) to make full payment.

Glen G. McDougall, J.