

SUPREME COURT OF NOVA SCOTIA

Citation: *Estate of Fitzgerald v. Fitzgerald*, 2022 NSSC 266

Date: 20220505

Docket: Syd. No. 499924

Registry: Sydney

Between:

Estate of Michael Joseph Fitzgerald, as represented by his Executor,
Michael Thomas Fitzgerald

Applicant

v.

Maureen Fitzgerald

Respondent

Cost Decision

LIBRARY HEADING

Judge: The Honourable Justice Patrick J. Murray

Written Submissions: January 18, 2022 and February 1, 2022

Written Decision: May 5, 2022

Subject: Cost

Facts:

[1] The Applicant Estate argued that the issue was a “novel and new point of law, not previously addressed in Nova Scotia”, and the Estate’s representative believed it was his father’s intention that the asset would be shared among all eight children, as stated in his father’s Will.

[2] Based on this genuine belief and the unsettled legal question, the Estate argued there should be no cost award to the Respondent, Ms. Fitzgerald.

[3] Ms. Fitzgerald argued this was a straightforward matter. She was entirely successful in her Application. The Respondent argued costs in a proceeding follows the result.

Issue: [4] What is the appropriate cost award?

Result: [5] Court found that a total cost award of \$10,563.00 plus disbursements would be the appropriate cost award. The amount to be payable by the Estate and not personally by Mr. Fitzgerald, the Executor, (except payment would not be from the share of Ms. M. Fitzgerald) but rather from the share of the remaining seven children.

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Submissions: January 31, 2022

Written Decision: May 5, 2022

Counsel: Peter Rumscheidt for the Applicant, Mr. Fitzgerald
Alan Stanwick for the Respondent, Ms. Fitzgerald

By the Court:

Introduction

[1] This is a decision on costs in relation to a ruling of this Court on December 8, 2021. In that decision, I held that a designation made in respect of a Tax Free Savings Account (TFSA) was governed by legislation and was not subject to a presumption of resulting trust. (See *Fitzgerald Estate v. Fitzgerald*, 2021 NSSC 355)

[2] It is generally acknowledged between the parties that the issue was a point of law not previously considered in this Province. That said, there were several decisions of this Court that were instructive and a helpful guide in my determination that Maureen Fitzgerald, the designated beneficiary, was the rightful recipient of the TFSA account belonging to her father, the late Michael Joseph Fitzgerald.

Position of the Applicant

[3] The Applicant Estate submits through its personal representative, Michael Thomas Fitzgerald, that it was obliged to pursue the potential claim to the TFSA funds for the benefit of all beneficiaries. This is especially so, given that the issue was a “novel and new point of law, not previously addressed in Nova Scotia”.

[4] In addition, the Estate’s representative believed it was his father’s intention that the asset would be shared among all eight children, as stated in his father’s Will.

[5] Based on this genuine belief and the unsettled legal question, the Estate submits there should be no cost award to the Respondent, Ms. Fitzgerald.

[6] In the alternative, should the Court find that an award of costs should be made, the Applicant submits the Court should exercise its discretion to award an amount less than the Tariff, given the case involved a new and unique legal determination.

The Respondent’s Position

[7] Ms. Fitzgerald submits this is a straightforward matter. She was entirely successful in the Application. Costs in a proceeding follows the result. (Rule 77.03(3))

[8] In addition, the general rule is that costs of an Application are fixed in accordance with the applicable Tariff, unless a judge orders otherwise. (Rule 77.06(2))

[9] The Respondent says that the Court should exercise its discretion to award costs in accordance with Tariff A based on the “Amount Involved” plus disbursements. In short, the Respondent was entirely successful and the Applicant Estate was entirely unsuccessful.

Analysis

[10] The Applicant submits that parties in a similar position as the Estate representative, Mr. Fitzgerald, should not be discouraged from advancing novel or new points of law, by a concern that an award of costs will be made against the Estate.

[11] In this case the Applicant claimed the funds held in the TFSA account at the Credit Union were rightfully those of the Estate. As stated, the grounds for the Application set out in the Court's decision, included the provisions of the Will of Michael Joseph Fitzgerald, who died on December 16, 2019.

[12] In response, Ms. Fitzgerald claimed her father made the voluntary decision to designate her as the beneficiary of his TFSA. In doing so, she relied upon the provisions of the *Beneficiary Designation Act of Nova Scotia*.

[13] In my decision I held that:

[121] The appropriate disposition of the TFSA funds of the late Michael Joseph Fitzgerald held at the Credit Union is that they belong to Maureen Fitzgerald as his designated beneficiary.

[14] In terms of costs, the Court must consider the circumstances of each case, in assessing the reasonableness of the actions of an Executor or personal representative. Often this involves a determination of whether the Executor is entitled to payment of costs from the Estate, on a solicitor client basis.

[15] In this case, while it may have been reasonable for the Estate to seek a ruling, a party must also consider that it is subjecting another party, in this case, Maureen Fitzgerald, to costs of her own. There is no guarantee of a favourable result once a proceeding is commenced.

[16] Here, the issue is party and party costs of the Application. Both the Applicant and Respondent retained counsel, filed briefs, submitted books of authorities, attended at the hearing, and made final submissions.

[17] The ultimate decision of this Court is to arrive at a decision that will "do justice" as between the parties. (Civil Procedure Rule 77.02(1))

Determination

[18] Exercising my discretion, I am satisfied that costs should follow the result, and be fixed in accordance with Tariff A, as prescribed by the Rules.

[19] In terms of the amount involved, it is monetary and clearly falls within the range set out from \$40,000 - \$65,000. Exhibit 4 Tab D indicated the amount of the TFSA account was \$53,235.92 as of December 31, 2019.

[20] Ms. Fitzgerald has submitted that she is entitled to costs under Scale 3, given the significance and complexity of the issue before the Court. The Respondent, therefore, seeks the sum of \$9,063 plus \$2,000 for each day of trial (\$4,000) for a total of \$13,063.

[21] The Applicant submitted that if the Court decided to award costs to the Respondent, the amount involved would be \$40,000 - \$65,000, but that Scale 2 would be appropriate.

[22] Based on Scale 2 the Applicant submitted an appropriate award would be the amount involved award of \$7,250 plus an additional \$4,000 for the two days of hearing for a total of \$11,250.

[23] The Estate submits that the complexity of the issue and the evidence would not justify Scale 3. With respect, I disagree, and my reasons for decision would support that conclusion.

[24] That does not end the matter however. It is my view, that some deduction should be made to the amount sought by the Respondent in consideration of the unsettled nature of the issue before the Court.

[25] Exercising my discretion under Rule 77.07(1), I find an appropriate reduction in the Tariff amount would be the sum of \$2,500.00 for a total cost award of \$10,563.00 plus disbursements.

[26] This amount shall be payable by the Estate and not personally by Mr. Fitzgerald, the Executor. In addition, the cost amount shall be payable from the Estate, except for the share of Ms. Maureen Fitzgerald, such that it is paid from the share of the remaining seven children.

Murray, J.