SUPREME COURT OF NOVA SCOTIA
Citation: *Billard v. Billard Estate*, 2022 NSSC 283

Date: 20221006
Docket: Ken No. 506551
Registry: Kentville

Between:

Tanya Arlene Billard

Applicant

v.

Estate of George William Billard

Respondent

COSTS DECISION

Judge: The Honourable Justice Gail L. Gatchalian

Submissions: Post Hearing by Applicant – July 13 and September 9, 2022
Post Hearing by Respondent – June 25, and September 9, 2022

Counsel: Jillian Gallant, for the Applicant
Jonathan Cuming, for the Respondent

By the Court:

Introduction

[1] In a decision dated June 14, 2022, I allowed the Application for Proof in Solemn Form brought by the Applicant, Tanya Arlene Billard, under the *Probate Act*, S.N.S. 2000, c.31. I found that the February 13, 2020 will of Tanya's father, George William Billard, was invalid as he did not have the requisite testamentary capacity, he did not know and approve of the contents of the will, and he was subject to undue influence by his son, Dennis Billard, in the execution of the will: 2022 NSSC 167. The 2020 will had named Dennis as executor, and provided that Dennis would inherit two pieces of real property, which formed the bulk of the value of the Estate. In his previous will, George had named Tanya as executor and left his entire estate to her. After my decision on the merits, the parties were unable to come to an agreement on costs. They filed written submissions in support of their respective positions.

[2] Tanya's position is that:

- She is entitled to costs on a solicitor-client basis.

- In the alternative, the tariff amount should be increased due to Dennis' conduct.

- Her costs should be paid by Dennis personally, and not out of the Estate.

- Dennis should not have his costs.

[3] Dennis' position is that:

- This is not an appropriate case for costs to be paid on a solicitor-client basis.

- Tanya is entitled to costs on a party-and-party basis, but with a reduction due to her conduct.

- Tanya's costs should be paid out of Estate funds and not personally by Dennis.

- Dennis, as personal representative of the Estate, should have his costs paid out of the Estate on a party-and-party basis.

[4] In order to determine the issue of costs, I will address the following questions:

(a) What rules and principles apply to a determination of costs?

(b) Is Tanya entitled to costs on a solicitor-client basis?

(c) If not, what is the tariff amount?

(d) Does the tariff amount substantially indemnify Tanya for her reasonable costs?

(e) Should the tariff amount be increased or decreased because of the conduct of the parties?

(f) Should Dennis pay Tanya's costs personally?

(g) Should Dennis have his costs paid from the Estate?

Costs Rules and Principles

[5] Section 92 of the *Probate Act* provides that, 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."

[6] However, s.92 does not limit the court's 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": Civil Procedure 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," meaning that the loser pays: Civil Procedure Rule 77.03(3).

[7] The starting point in determining the amount of costs is the *Tariffs of Costs and Fees* under Civil Procedure Rule 77. Party and party costs of an Application in Court must, unless the judge who hears the Application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial: Civil Procedure Rule 77.06(2).

[8] A judge has the discretion to add or subtract from the tariff amount: Civil Procedure Rule 77.07(1). Furthermore, a judge "may award lump sum costs instead of tariff costs": Civil Procedure Rule 77.08. Tariffs are the norm, and there must be a reason to consider a lump sum: *Armoyan, supra* at paras.14-15.

[9] The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to, the party's reasonable fees and expenses: *Armoyan, supra* at para. 16.

[10] The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: *Armoyan, supra* at para. 17.

[11] In rare and exceptional circumstances, solicitor and client costs may be awarded to discourage or censure conduct of a litigant or in circumstances where the successful party ought not to be put to any expense for costs: Civil Procedure Rule 77.03(2).

[12] These rules and principles apply to estate litigation. If a personal representative is discharging their duties and is acting reasonably, they can be expected to be indemnified from the estate. The same cannot be said for an adverse party, who may obtain party-party costs if successful, but may have to bear their own costs or have to pay them, if unsuccessful. If the proceeding can be attributed to the conduct of the deceased or residual beneficiaries, a losing party may still recover costs from the estate, although usually on a party-party basis. If costs are awarded against or out of an estate, the burden of that expense is borne by the residual beneficiaries. It is appropriate to question whether this is fair, for example, when there is an unsuccessful party who is the cause of the litigation. See *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79, [2015] N.S.J. No 339 at paras.90-100. One rationale for the practice of allowing personal representatives to have their costs paid from the estate is that they may have no interest in the

outcome and no other source of reimbursement for their legal expenses: see *Morash Estate v. Morash*, [1997] N.S.J. No.403 (NSCA) at para.22.

Solicitor-Client Costs

[13] Dennis' conduct in this litigation cannot be characterized as exceptional, extraordinary or reprehensible, or as calling out for denunciation in the form of an award of solicitor-client costs against him: see *Maskell Estate (Re)*, 2017 NSSC 325 at para.17. I therefore decline to award Tanya costs on a solicitor-client basis.

Tariff Amount

[14] While the Application was not about a specific amount of money, the Estate consisted of two pieces of real property, which were valued at $76,000 in a draft inventory, and a life insurance policy of $35,000 listing the Estate as the beneficiary, for a total of value of $111,500.

[15] The "amount involved," for the purposes of Tariff A, is $111,500. Applying Scale 2 (basic) to this amount would result in fees of $12,250, plus $2,000 per day for each full day of hearing ($6,000), for a total of $18,250. Tanya also seeks reimbursement for the following disbursements: filing fees in the amount of $96.15 and postage in the amount of $93.71.

Substantial Indemnity?

[16] Tanya says that she incurred legal fees of $36,554.63. She did not file affidavit evidence to establish the legal costs that she actually incurred. The tariff amount of $18,250 is approximately 50% of what Tanya says she incurred in legal fees. A costs award of $18,250 would substantially indemnify Tanya for what she says she incurred.

Should the Tariff Amount be Increased or Decreased?

[17] Tanya says that the tariff amount should be increased under *Civil Procedure Rule* 77.07(2)(e) due to Dennis' conduct. The example that she gives is that Dennis did not file his affidavits by the deadline set by the Court, resulting in an adjournment of the hearing dates and two-month delay. Dennis acknowledges that its affidavits were filed late, but notes that it sought to preserve the scheduled hearing dates.

[18] Dennis says that the following conduct of Tanya warrants a decrease to the tariff amount under Rule 77.07(2)(e):

- Tanya neglected to advertise the Application in the Royal Gazette as required by s.71(4) of the *Probate Court Practice, Procedure and Forms*

Regulations, NS Reg 119/2001 under the *Probate Act*, requiring an adjournment and rescheduling of the motion for directions approximately one month later.

- During the hearing, when it appeared that Tanya was also seeking an order that George's previous will be admitted to probate, the court required the parties to brief the issue. Tanya ultimately decided not to pursue proof of the previous will in this proceeding.

- Affidavits filed on behalf of Tanya contained hearsay, resulting in objections made by the Estate. Tanya filed amended affidavits to address the hearsay objections.

[19] As both parties were responsible for some delay and additional expense, I find that an adjustment to the tariff amount is not justified.

[20] Dennis says that he sent a formal request that Tanya admit that the formalities of execution had been established, in order to avoid the need for Mr. Michael MacKenzie, who prepared the will, to prepare an affidavit and to testify. Dennis says that Tanya unreasonably refused to make these admissions, warranting a decrease to the tariff amount under Civil Procedure Rule 77.07(2)(h). In my view, Mr. MacKenzie's affidavit and oral testimony related not only to the

formalities of execution but also to the issue of testamentary capacity. Therefore, Tanya's refusal to make the admissions did not have an appreciable effect on the length of the hearing, and does not justify a decrease from the tariff amount.

[21] The next question is whether Tanya's costs should be paid by Dennis personally or by the Estate.

Who Should Pay Tanya's Costs?

[22] Dennis says that he should not have to pay Tanya's costs personally, but rather that they should be paid by the Estate, stating that the Application was in part necessitated by the actions of the deceased, and that Dennis, as personal representative, acted reasonably in contesting the Application.

[23] After reviewing the parties' initial costs submissions, I wrote to them and asked for their position on the following questions: (1) If the Court were to accept Tanya's position that Dennis should pay costs personally to Tanya, can the Court do so where Dennis is not named as a party and (2) Can or should the Court amend the name of the Respondent in the style of cause to Dennis Billard, Personal Representative of the Estate of George William Billard, in light of the decision of the Court of Appeal in *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79 at paras. 1-

3 to, on its own motion, amend the style of cause to name the personal representative as the Respondent rather than the estate.

[24] Tanya's response was that Dennis was, in reality, a party to the Application, as he was actively involved throughout the proceeding as the personal representative of the Estate. Dennis' response was that Dennis should not be named as a Respondent because he is no longer, as of the decision on the merits, the personal representative of the Estate.

[25] While the Notice of Application does not include a style of cause setting out the name of the Applicant or the Respondent, it complied with Form 45 – Notice of Application contained in the Regulations. Under the regulations, when a personal representative is not an applicant and the application is respecting a contentious matter, such as this one, the personal representative is a respondent and must be shown as a respondent in documents filed with the court: ss.63(1)(a), 64(2) and 64(4) of the Regulations Furthermore, Dennis, as personal representative, was in reality a party to the Application: he filed a Notice of Objection to the Application in his name, as personal representative of the Estate, and actively participated, through counsel, in all pre-hearing matters and throughout the hearing, in opposition to the Application. Pursuant to my authority to do so under Civil Procedure Rule 35.08(1), I order that Dennis Billard, personal representative of the

Estate of George William Billard, be named as a Respondent in the style of cause in this proceeding, in order to reflect the fact that he was, under the Regulations, a Respondent, and the fact that he was, in reality, a party to the Application.

[26] The question is whether I should order that Dennis personally pay Tanya's costs. I believe that he should, for the following reasons.

[27] First, the general rule is that the loser pays. Dennis did not take a neutral position in the Application. He actively opposed it. I find that he did so not only in his capacity as personal representative, but in his capacity as the primary beneficiary of the 2020 will. He sought to protect his own interests, at the expense of Tanya's. He filed affidavits and conducted cross-examination of Tanya and her witnesses. He lost, and should pay Tanya's costs.

[28] Second, the source of the litigation is not reasonably traceable to the actions of George. I found, in the decision on the merits, that George was gravely ill, and that he lacked testamentary capacity: paras.81 and 83. Rather, the source of the litigation is reasonably traceable to the actions of Dennis. I found that Dennis unduly influenced George: para.86.

[29] Third, Tanya was the sole beneficiary of George's previous will. Because of Dennis' actions, the previous will was destroyed by the law firm that drafted the

2020 will, and Tanya only has an unsigned copy of the previous will. If she successfully proves that will, an order that her costs of this proceeding be paid from the Estate will mean that she is paying for her own costs. Such a result would, in my view, be unfair in the circumstances of this case.

[30] If Tanya does not successfully prove the previous will, then George's estate will be distributed to his five children under *Intestate Succession Act*, R.S.N.S. 1989, c.236 s.4(7). An order that Tanya's costs be paid from the Estate would then mean that George's children will be responsible for paying her costs from their share of the Estate. This would also, in my view, be unfair.

[31] For all of these reasons, it would not do justice between the parties for the Estate to bear the costs of the litigation. Dennis is responsible to pay Tanya's costs.

[32] For these same reasons, I find that it would not do justice between the parties to allow Dennis to have his costs paid from the Estate.

Conclusion

[33] For the above reasons, I order that:

1. Dennis Billard shall personally pay the costs of Tanya Billard in the amount of $18,250, as well as reasonable disbursements in the amount of $189.86 for filing fees and postage.

2. Dennis Billard shall bear his own costs, and for greater certainty, he is not entitled to have his costs paid by the Estate.

Gatchalian, J.