SUPREME COURT OF NOVA SCOTIA

Citation: *Smith-Spurrell v. Smith*, 2023 NSSC 291

Date: 20230915
Docket: SAM 517554
Probate: 12074
Registry: Amherst

In the matter of:

The Estate of Darrell Winston Smith, deceased

Between:

Angela Joanne Smith-Spurrell

Applicant

v.

Darren Wade Smith

Respondent

Decision on Appointment of New Personal Representative (s. 61(3) *Probate Act*) and Costs

Judge: The Honourable Justice Timothy Gabriel

Heard: By written submissions

Final Written Submissions: August 29, 2023

Counsel: Parker Byrne, for the Applicant
Alan Freckelton, for the Respondent

By the Court:

[1] In *Smith- Spurrell v. Smith*, 2023 NSSC 196 ("the earlier decision"), I granted the motion of the Applicant, Angela Joanne Smith-Spurrell pursuant to s. 61 of the *Probate Act* SNS 2000, c. 31 ("the Act") to remove her brother, Darren Wade Smith, as a co-executor of the Estate of Darrell Winston Smith, their late father. The third co-executor, Henry Burris, was not named as a party, and remains unaffected by the proceeding. He is still a co-executor, along with the Applicant.

[2] However, s. 61 (3) of the Act provides that:

> Where the court removes or discharges a personal representative, it shall appoint a new personal representative in the place of the personal representative that was removed or discharged.

[3] Having received no submissions from either party on this point when the application was heard (May 3, 2023), I invited submissions from the parties on this, and also on costs, if they were unable to agree with respect to either. Somewhat unsurprisingly, given the history of this proceeding, they were unable to agree on anything. Each has provided an Affidavit from their respective "candidate" to replace the Respondent as co-executor, and has also provided materials and submissions with respect to costs.

A. Who should be appointed co-executor in the Respondent's stead?

[4] I am in receipt of an Affidavit from Jean Evelyn Smith, of Bedford Nova Scotia, whom the Applicant proffers as an appropriate co-executor. I am also in receipt of an Affidavit from the Respondent's candidate, David Burris, of Tillsonburg, Ontario. Neither side has requested cross-examination of either deponent.

[5] Some guidance as to how to begin to deal with this issue is found in the Act at s. 32(1):

> Subject to Sections 15, 23 and 24 of the *Public Trustee Act*, administration of the estate of an intestate or of an estate partly or wholly unadministered owing to the death or removal of a personal representative shall be granted to one or more of the following persons, if they are competent and suitable for the discharge of the trust and willing to undertake the administration of the estate unless the court thinks it proper to appoint some other person, according to the following priorities:

> (a) first - the spouse of the intestate if the spouse resides in the Province and those children of the intestate who reside in the Province;
>
> (b) second - those persons who reside in the Province and who are entitled to share in the distribution of the estate by reason of the *Intestate Succession Act* or by reason of being adult residuary beneficiaries;
>
> (c) third - the Public Trustee;
>
> (d) fourth - those persons who do not reside in the Province and who are entitled to share in the distribution of the estate by reason of the Intestate Succession Act or by reason of being adult residuary beneficiaries;
>
> (e) fifth - a creditor or a person having a cause of action against the estate.

[6] Only two candidates have been put forward as "willing to undertake the administration of the estate." Neither fits squarely into any of the categories found above. The salient points in Jean Evelyn Smith's Affidavit of July 11, 2023 are reproduced below:

> 4. I am a Nova Scotia resident and reside in Bedford, Nova Scotia.
>
> 5. I travel regularly to Port Howe, Nova Scotia, to visit my family.
>
> 6. Darrell Winston Smith was the cousin of my father, Roy Smith, and my father grew up with him and remained close with him for his entire life.
>
> 7. My father and my mother, Doris Smith, would check in on Darrell Smith and assist him after the death of his wife in 2013 until his death in 2021.

[7] In his Affidavit of July 12, 2023, David Burris says this:

> 5. I wish to act as an executor because I believe it is important that [the Respondent] Darren's interests and the interests of his children are represented and considered by the executors and decisions made about the estate.
>
> 6. Although <u>I intend to represent Darren's interests</u>, I hereby undertake to make all decisions according to what is best for the estate, and not solely in Darren's best interests or the best interests of his children.
>
> [Emphasis added]

[8] The Applicant feels that she could work well with Jean Evelyn Smith. She does not feel similarly toward David Burris. She expresses concern that the latter had been assisting her brother with some of the behaviour in relation to which both she, and the Court (in the earlier decision), have expressed concern.

[9] It is important to bear in mind that there is no direct evidence before the Court that Mr. Burris was implicated in some or any of the conduct exhibited by the

Respondent. Merely because the Applicant advances such a concern, in the written submissions of her counsel, does not make it so.

[10] With that having been said, it is important to recall the manner in which the Court summed up the actions of Darren Wade Smith, in the earlier decision:

> [50] The level of hostility and contrariness that has been demonstrated by the Respondent toward the Applicant has had a deleterious effect on the Estate and is actively frustrating the intentions of their late father, and the distribution of his assets in the manner which he had intended.
>
> [51] Clearly, as a result of this antipathy, the Respondent is unable to discharge the duties required of an executor and trustee of his father's estate. The beneficiaries, which include the Respondent's own children, are being done a significant disservice by the manner in which he has conducted himself.

[11] The reason to which David Burris adverts in his Affidavit, "... I wish to act as executor because I believe it is important that Darren's interests and the interests of his children are represented and considered..." does signal the possibility of a certain alignment, perhaps sympathy, with the Respondent's interests. One of the reasons why the Respondent was removed as co-executor is that he was unable to put his personal animosity toward the Applicant to the side and discharge his duties to the Estate in accordance with the parties' late father's wishes, as expressed in the Will.

[12] The Court was also of the view that Ms. Smith-Spurrell suffered from no such limitation and was able to carry out her duties to the Estate and all beneficiaries, notwithstanding the negative interpersonal relationship between her and her brother. I am of the view that the Applicant needs no "guiding rudder" to steer her in the direction required to fairly deal with the affairs of the Estate, and/or any of the beneficiaries or their families.

[13] Moreover, the Applicant's evident concern about working with David Burris, in and of itself, has the significant potential to become an impediment to the administration of her father's estate. It is particularly important that any foreseeable (even if merely potential) obstacles to the smooth conclusion of the Estate's affairs be avoided, given the delay and expense that has been engendered thus far.

[14] The Respondent does discuss the concern expressed in the Applicant's brief, as to the possibility of David Burris' motivation to focus on the interests of the Respondent, should he be named co-executor. He does so in the following terms:

> Mr.[David] Burris has addressed this issue in his affidavit. In any event, it is respondent's submission that his interests are represented in all discussions among the executors, although no one beneficiary's interest can ever be the exclusive or overriding concern of any executor. In any event, the respondent expresses much the same concerns about Ms. Jean Smith, namely that she would act in the interests of the applicant rather than those of the estate.
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> *(Respondent's Submissions as to Replacement Executor, para. 13(b))*

[15] The Respondent argues, additionally, that while Mr. Burris is currently resident in Ontario, he is retired and is prepared to relocate to Nova Scotia until the Estate is wound up. There is nothing in Mr. Burris' Affidavit providing such an indication.

[16] Even if she is currently working, it is an important fact that Ms. Jean Smith is a Nova Scotia resident, particularly where the Applicant herself resides out of Province. Ms. Jean Smith also has family in Port Howe and is a regular visitor to the area. She attests to the close relationship which her family has had with the deceased, Darrell Smith, up to his death in 2021, and that she is willing and able to work in concert with the Applicant and Henry Burris as co-executors.

[17] Mr. David Burris, on the other hand, and despite the brevity of his Affidavit (in fairness, Ms. Smith's Affidavit is equally brief) took the time to specify and stress the importance of the Respondent's interests being represented in the affairs of the estate. Although he tried to contextualize that concern in paragraph 6 of his Affidavit, his choice in raising this specific topic gives the Court some pause.

[18] I consider these issues, as well as the importance of a co-executor who is able to work well with the other two. I consider the Applicant's apprehension that she will not be able to work well with David Burris. This apprehension itself, whether there is actually a realistic basis for it or not, may pose an impediment to the smooth functioning of the Estate from here on in.

[19] Having considered the foregoing, I appoint Jean Evelyn Smith as co-executor, in the stead of Darren Wade Smith, pursuant to s. 61(3) of the Act. As a consequence, she shall "have all of the powers and shall perform all of the duties of the personal representative who was removed or discharged" (s. 61(4)).

B. What is an appropriate award of costs, and to whom, in the circumstances of this case?

[20] Generally speaking, costs should follow the event. The object of the exercise is to do justice between the parties, in the circumstances of the case. A costs award should provide the successful party with a substantial contribution toward their costs. I have a broad discretion in terms of how I go about attempting to achieve that objective.

[21] *Civil Procedure Rule* ("CPR") 77, and the tariffs which accompany it, provide the Court with direction and guidance in terms of how its discretion should generally be exercised. A party seeking an award that is greater than what the applicable Tariff would provide bears the onus of demonstrating to the court that the application of the Tariff, in the circumstances of the case, would not achieve a just result.

[22] Since this was an estate matter, recourse is first had to the Act and, in particular, s. 92 thereof:

> (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.
>
> (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.
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> (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.
>
> (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.
>
> [Emphasis added]

[23] Next, s. 102 of the Act is referenced:

> Where no provision is made in this Act or in the Probate Rules with respect to practice or evidence and in so far as this Act or the Probate Rules do not extend, the *Civil Procedure Rules* apply.

[24] I will now reproduce the most pertinent portions of CPR 77 below:

77.01 Scope of Rule 77

(1) The court deals with each of the following kinds of costs:

(a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;

(b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;

(c) fees and disbursements counsel charges to a client for representing the client in a proceeding.

(2) Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule.

77.02 General discretion (party and party costs)

(1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

(2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

. . .

77.05 Assessment of interlocutory costs

(1) The provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise.

(2) A judge may assess costs, and provide for payment of costs, when a motion is withdrawn or abandoned.

77.06 Assessment of costs under tariff at end of proceeding

(1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

(2) 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.

(3) Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with Tariff C.

77.07 Increasing or decreasing tariff amount

(1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
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> > (a) the amount claimed in relation to the amount recovered;
> >
> > (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
> >
> > (c) an offer of contribution;
> >
> > (d) a payment into court;
> >
> > (e) conduct of a party affecting the speed or expense of the proceeding;
> >
> > (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
> >
> > (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
> >
> > (h) a failure to admit something that should have been admitted.
>
> (3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.
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> **77.08 Lump sum amount instead of tariff**
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> A judge may award lump sum costs instead of tariff costs.
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> . . .
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> **77.10 Disbursements included in award**
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> (1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.
>
> (2) A provision in an award for an apportionment of costs applies to disbursements, unless a judge orders otherwise.
>
> **77.11 Set-off against party and party costs**
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> A judge who awards party and party costs may order a set-off against another award of costs or any other amount.

[25] I mentioned earlier that costs generally follow the event. This is a departure from earlier cases which sometimes ordered costs payments to be born by the Estate, notwithstanding the relative success of the litigants.

[26] The current approach is discussed in *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79:

[96] The increasing primacy of the usual rule finds expression in a recent decision of the Ontario Court of Appeal. In *McDougald Estate v. Gooderham*, 2005 CanLII 21091 (ON CA), [2005] O.J. No. 2432 (Ont. C.A.), Gillese, J.A. speaking for the court, described the contemporary approach:

> [80] However, the traditional approach has been – in my view, correctly – displaced. The modern approach to fixing costs in estate litigation 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. Four cases usefully illustrate this modern approach.
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> […]
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> [85] The modern approach to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

[97] This trend appears in some Nova Scotia cases: *Harnum v. Moser*, 2007 NSSC 351; *Van Kippersluis v. Van Kippersluis Estate*, 2011 NSSC 399.

[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.

[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 (*Casavechia, supra; Townsend v. Doherty*, 1993 O.J. No. 713, per Borins J. as he then was; *Gamble v. McCormick*, 2002 O.J. No. 2694 (S.C.J.); *Holzel v. Mjeda*, 2000 ABQB 549; *Oldfield v. Oldfield Estate*, 1994 O.J. No. 2529).

[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.
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> [Emphasis added]

[27] The Applicant refers to another Court of Appeal decision closely contemporaneous with *Wittenberg*, namely, *Casavechia v. Noseworthy*, 2015 NSCA 56:

> [70] In summary, there is a long line of jurisprudence in this Province that has held that the costs of the executor or personal representative of an estate involved in litigation pertaining to the estate is entitled to costs from the estate on a solicitor and client basis if it has acted reasonably.

[28] I also consider the comments of Rosinski, J. in *Burgoyne Estate (Re),* 2017 NSSC 275, where he observed:

> [8] In estate matters the starting point is s. 92 of the *Probate Act*. Personal costs against an estate representative are permissible expressly where, "the application is made as a result of the personal representative failing to carry out any duty imposed on the personal representative by this Act", or, "in circumstances where the personal representative who has made an application that the court concludes 'is frivolous or vexatious'. In *Wittenberg v Wittenberg Estate*, 2015 NSCA 79 (see also *Casavechia v. Noseworthy*, 2015 NSCA 56), Justice Bryson emphasized that:
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>> "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." (para. 99)
>
> [9] To my mind, the first question to be answered is whether the co-executors here acted reasonably. Gary's head injury had ongoing impacts on his cognitive abilities. It was not unreasonable for Gary to continue as co-executor, nor was it unreasonable for Daniel to question Gary's capacity to continue as co-executor. To that end, Daniel brought his application.
>
> . . .
>
> [11] Generally, it is appropriate for the estate to reimburse co-executors on a solicitor/client basis, since they are presumed to be acting with the authority and best interests of the estate in mind. I have found this to be the case here.

> [12] Given that the adverse parties here were both executors, I am satisfied that the general rule should be followed; costs should be reimbursed on a solicitor/client basis from the estate.

[29] As we have seen above, s. 92(3) of the Act does indicate that the Court may order the cost of an application against an executor where the application has been necessitated by the failure of that executor to carry out any duty imposed on them by the Act.

[30] The Applicant argues that she was acting reasonably, in all of the circumstances, in seeking the removal of her brother as co-executor of her father's estate. The reasonableness of her conduct is demonstrated by the fact that the Court agreed with her and ordered the removal of Darren Wade Smith in that capacity. She references the findings made in relation to Mr. Smith's conduct, which are summarized in the previously cited paragraphs 50 and 51 from the earlier decision. This is a situation more analogous to that which the Court encountered in *Wittenberg* (the argument continues) whereby it would be inappropriate for the residuary beneficiaries of the estate to bear the expense. Rather, Ms. Smith-Spurrell argues that:

> The Respondent is the unsuccessful party who was the cause of the litigation and it is proper that the respondent bears most if not all of the financial burden.
>
> *(Applicant's Submissions on Costs following Decision, para. 36)*

[31] The Applicant's primary position is that she should receive an award of solicitor-client costs. She argues that she is entitled to full indemnity with respect to the costs incurred, which amount to $38,066.62. Counsel for the Applicant has provided detailed records, in affidavit form, with respect to the time spent which generated his share of the Applicant's overall legal expenses, which was $32,974.32, plus an additional sum of $4,709.25 which represents legal time spent in this matter which is as yet unbilled.

[32] In addition, he points out that, since the Applicant resides in Alberta, it was necessary, over the course of the proceedings, to attend to obtain notarization of various documents for use in this proceeding, and she did so while utilizing the services of Chestermere Law, LLP in Chestermere, Alberta, as well as FedEx to transport the sworn documents to counsel's office in Amherst, Nova Scotia *(Applicant's Submissions on Costs, paras. 13-16)*. This amounts to $383.05 "to the best of [the Applicant's counsel's] knowledge" (*Counsel's Affidavit dated July 13, 2023, para.15)*.

[33] It is (therefore) argued that a solicitor-client costs award representing full indemnification should be in the amount of $38,066.82. In the alternative, the Applicant seeks an award assessed against the respondent in accordance with Tariff A, scale 2 (basic), with an "amount involved" set at the total value of the estate, which is $692,721.63, in accordance with the figure listed on the "Application for Grant of Probate" filed by the parties.

(i) Was the Applicant the successful party and should she receive an award of costs?

[34] As to whether the Applicant was the successful party, the Respondent's submissions amount to the fact that the Court ought not to be too quick to say "yes." This is despite the fact that the Court was very critical of some of his conduct throughout the course of the parties' management of the Estate. For example, he adverts to CPR 10.03. His counsel then proceeds to bring to the Court's attention a settlement offer which was extended by the Respondent to the Applicant on March 16, 2023 which is as follows:

> 24. On 16 March 2023, on the respondent's instructions, I sent an e-mail to the applicant's legal representative, Mr Byrne, which read as follows:
>
> > My client has instructed me to amend his offer as follows: (1) Darren renounces his role as executor and his uncle, David Burris, is appointed in his place. Mr Burris has informally told my client that he is willing to take on this role, and I have asked for his consent in writing. (2) The executors engage a new lawyer as proctor for the estate. This lawyer must not have had any previous dealings with any of the executors or their families. (3) The house to be cleaned out and ready to be listed for sale by 1 April 2023 (if that is still possible). (4) All necessary steps are taken as soon as possible for Kelsey and Elizabeth to have access to their RESPs. My client's position, and that of his daughters, is that he should be appointed as the subscriber to the RESPs, and I don't see how it is your client's role to decide that my client is not fit to handle his own daughters' RESPs. Nevertheless, I believe there is still room to negotiate there. (5) All bills in the name of Darrell Smith to be paid from the estate as soon as possible.

[35] He further brings to the Court's attention that the Applicant's response to this proposal was communicated to the Respondent on March 31, 2023, and consisted of "my client declines this offer as she does not think David Burris is an acceptable replacement executor nor did she think a replacement executor is necessary."

[36] Although this point is not argued by the Respondent's counsel, it would appear that insufficient thought was given by the Applicant to the fact that a

replacement executor would be necessary in the event that the matter proceeded to court, and she was successful (s. 61(3) of the Act). On the other hand, the Court has subsequently agreed with her, in this decision, that, of the two potential executors put forward for the co-executor's position from which Mr. Smith has been removed, David Burris was the least satisfactory. It does not mean, however, that David Burris would have necessarily been a bad choice (indeed, the court does not have sufficient information before it to state that such would have been the case). It merely means that, on the balance of probabilities, the Applicant's "candidate" was preferable.

[37] I also consider the Respondent's point with respect to the RESP's, which was mentioned in the settlement proposal. I noted in the earlier decision that a professional advisor had outlined two options, one of which would be to change the subscriber from the deceased to someone else so that the education plan may continue, or to wind up the RESP and distribute the funds to the estate.

[38] It appears that neither party was comfortable with the second option. However, the Applicant alleged that the Respondent was prone to making bad financial decisions and took the position that the funds ought not to be transferred into his name (notwithstanding that the fund was intended to benefit his children). I also note that it was indicated in the settlement offer that there might be "still room to negotiate" with respect to what was to be done with the RESPs.

[39] In the earlier decision (at para. 48) I expressed the view that I was unsure that the Applicant was being completely objective in opposing the transfer of the RESPs into the name of the Respondent, since they were for the benefit of his children. That said, her conduct in bringing one of the Respondent's daughters to the bank in an attempt to secure for that child the benefit of the RESP, was a sufficient indication to the Court that, despite whatever negative feelings she had for the Respondent, she was prepared to put them aside and attempt to carry out her father's wishes as expressed in his Will.

[40] Notwithstanding the above concerns, and the settlement offer put forward by the Respondent, I consider the Applicant to have been the successful party. I say this despite the significant amount of money that was expended in legal fees by both parties after the settlement offer was made. In order to accept the offer, it would have been necessary to accept David Burris as his replacement. As I have said, while the Court cannot make any findings that he would necessarily have been unacceptable, given his apparent ties to the Respondent, and his subsequent (directly expressed) concern with respect to the Respondent's "interests, and those of his family" as

requiring representation, I cannot dismiss the Applicant's concern as unrealistic or trivial either.

[41] In my view, the points raised by the Respondent reflect more properly upon the overall amount of the award of costs which the Applicant should receive, rather than upon whether she was the successful party.

(ii) Solicitor-Client Costs?

[42] It is beyond question that the Court, in furtherance of its objective to achieve a just result, may award solicitor-client costs in appropriate circumstances. The situations in which it is appropriate to do so, however, are comparatively rare. In *Willisko v. Pottie Estate*, 2015 NSSC 45, Gogan, J. considered awarding solicitor-client costs against a Respondent executor after successful application for her removal. In so doing, she noted:

> [24] In *McCully v. Rogers Estate*, 2012 NSSC 435, Scanlon J. (as he then was) dealt with the issue of costs following a frivolous application. Justice Scanlon found that from very early on and at nearly every juncture of the litigation, the Applicant should have known that her case didn't have merit. Both the Estate and the residual beneficiary sought costs on a solicitor and client basis. Scanlon J. was satisfied that he had authority to award solicitor and client costs and reasoned at para. 9:
>
> > 9 I am satisfied that the Court has authority to grant solicitor/client costs but the Court should reserve the granting of solicitor/client costs to exceptional or extraordinary circumstances. As noted by Justice Hood in *Smith's Field Manor Development Ltd. v. Campbell*, 2001 NSSC 44, at para 483 conduct deserving of solicitor/client costs includes both reprehensible behaviour of a milder form of misconduct. Referencing *Lueng v. Leung*, [1993] B.C.J. No. 2909 (B.C.S.C.), reprehensible is defined to:
> >
> > > …include conduct which is scandalous, outrageous or constitutes misbehaviour; but it also includes milder forms of misconduct. He said it means simply deserving of reproof or rebuke.

[43] However, she ultimately concluded that an award of solicitor-client costs was inappropriate because:

> [28] The Respondent did fail to act in a manner consistent with her duties and responsibilities as a personal representative. This overall failure was clear in my view. In some aspects her conduct was flagrant and in other aspects simply misguided. The Respondent explained her conduct with reference to what she believed were the wishes of her father. I did not find her conduct motivated by personal disputes with siblings. Although I found that she was less than forthright,

> accountable or transparent in her conduct, in the end she provided the original will and made disclosure of the bank account balances. Overall, I cannot say that the Respondent's conduct was egregious or outrageous. In my view, it was something less.

[44] In *Power Estate (Re)*, [2007] NSSC 16, Coughlan, J. pointed out:

> [14] It is clear from the authorities that solicitor and client costs are awarded only in rare and exceptional cases where there is proof of conduct tantamount to fraud or an abuse of process.

[45] It is tempting to view the cumulative acts of the Respondent as outrageous and, in some instances reprehensible and abusive. For example, his conduct in going to the police and alleging that the "jams and jellies" given away, with his acquiescence, by the Applicant at their father's wake, had been stolen, could be characterized by the latter descriptor. At the very least, it was petulant and childish.

[46] His consistently confrontational, obstructionist, and volatile reactions to many of the Applicant's efforts to move the Estate along, as well as his actions which led to the Estate's lawyer and Proctor resigning, are also troubling. As I mentioned in the earlier decision, his demeanour during cross-examination was extremely hostile toward the Applicant. In the end result, that hostility impaired his ability to work, in concert with his co-executors, in furtherance of the administration of the Estate.

[47] This is not to say that the Applicant's antipathy was non-existent. The most that can be said is that it did not seem to impair her ability to calmly discuss the needs of the Estate while giving her evidence, or to actually carry out her duties with respect thereto. With that said, as noted above, I did not get the impression that her opposition to transferring the RESPs set up by their father for the benefit of the Respondent's children was a rational and principled one. I did get the impression that she was willing to do everything (other than transfer the funds into the Respondent's name) in her power to see that the Respondent's children receive the benefit that the deceased had intended.

[48] As is apparent from the offer of settlement forwarded to her by the Respondent, the status of the RESPs with respect to his children was one of his concerns. That was not an unreasonable point (even though, as just mentioned, I have no concern that the Applicant will ultimately fail to do what is right with respect to that money). Moreover, as is also discussed above, on the basis of the evidence that has been led, his position with respect to the appointment of David Burris was

not unreasonable *per se*. There was simply a better candidate available, as it ultimately turned out.

[49] As a consequence, although I have grave concerns with respect to the Respondent's conduct, I have not been satisfied that such (overall) rises to such a level as to merit an award of solicitor-client costs against him.

[50] I will therefore move on to consider what should form the basis of an appropriate award of costs.

(iii) What costs award would do justice between the parties?

[51] I am satisfied that an award of costs against the Respondent personally, to be paid to the Applicant, is an appropriate result having regard to the authorities and the circumstances of this case. The Applicant has taken the position that, in the event the Court decline to make an award of solicitor client costs, that it should award costs based on Tariff A in the CPR based on an amount involved of $692,721.63. This is what Tariff A says:

Tariff of Fees for Solicitor's Services Allowable to a Party

Entitled to Costs on a Decision or Order in a Proceeding

In applying this Schedule the "length of trial" is to be fixed by a Trial Judge.

The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars ($2,000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge.

Amount Involved	Scale 1 (-25%)	Scale 2 (Basic)	Scale 3 (+25%)
Less than $25,000	$ 3,000	$ 4,000	$ 5,000
$25,000-$40,000	4,688	6,250	7,813
$40,001-$65,000	5,138	7,250	9,063
$65,001-$90,000	7,313	9,750	12,188
$90,001-$125,000	9,188	12,250	15,313
$125,001-$200,000	12,563	16,750	20,938
$200,001-$300,000	17,063	22,750	28,438
$300,001-$500,000	26,063	34,750	43,438
$500,001-$750,000	37,313	49,750	63,188
$750,001-$1,000,000	48,563	64,750	80,938

more than $1,000,000	The Basic Scale is derived by multiplying the “amount involved by 6.5%.

[52] The Respondent also compares the costs incurred by the Applicant with his own legal costs. He points out that, in contrast to the $38,066.62 sought by her, his costs amounted only to $15,771.25 *(Respondent’s Submissions as to Costs, para. 18)*.

[53] In so doing, he expresses some concern as to the necessity for the Applicant to travel to Nova Scotia’s frequently as she did, and among other things, argues that many of her consultations with legal representatives could have been carried out remotely.

[54] I observe that some of the differences in the ultimate legal costs incurred by each of the parties reflect the different amounts of work which needed to be done in order to initiate the application and respond to some of the Respondent’s impugned conduct both before and after he had secured legal representation.

[55] This matter consumed less than one full day of court time and was with respect to one very specific issue. It was an application to remove the Respondent as co-executor. The full amount of the resources of the Estate was never at risk. There has obviously been some dissipation (with respect to the assets) caused by the length of time that it has taken to administer the Estate due, in part, to some of the obstruction that was caused by the Respondent. That, however, is quite different than stating that an “amount involved” should be fixed upon the basis of the full amount of the inventory filed when the Estate was opened with the Court.

[56] In these circumstances, it would have been more appropriate to adopt the approach taken in those authorities which focus upon an “amount involved” based upon the amount of the estate assets actually “at risk” in the litigation (see, for example, *Lovett v. Maskell Estate*, 2017 NSSC 325; *Irving v. Irving Estate*, 2016 NSSC 349).

[57] In this case, however, I observe that fixing an “amount involved” is particularly difficult given that almost no evidence is available that is relevant to how much of the Estate assets were actually at risk. For example, I have no evidence of ongoing interest costs on debt that could have been paid down had some assets been liquidated earlier, or lost opportunities to liquidate individual assets at a more favourable price, or the like. Given the paucity of relevant evidence, the exercise of fixing an “amount involved” for the application of Tariff A would necessarily be an arbitrary one.

[58] As a consequence, I exercise my discretion to award a lump sum amount of costs (CPR 77.08). I consider the global amount of costs incurred by the Applicant in bringing this application. I consider the amount of legal expense incurred by her prior to bringing it, in dealing with the Respondent's conduct, which ultimately made the application necessary. I consider the costs of the Respondent in opposing it. I consider the specific nature of the actions of the Respondent, the potential reasonable bases for only a few of them, and the irrationality of some others. I also consider the offer to settle forwarded by the Respondent, and all of the other factors discussed above. Finally, I consider the supreme importance of the resolution of the matter to the parties, the Estate, and the beneficiaries.

[59] I bear in mind that an amount which does justice between the parties ought to result, in this case (as in most others) in a substantial, although incomplete, recovery of the reasonable expenses incurred by the successful party. In the circumstances of this case, I consider that an award of $20,000, inclusive of disbursements, to be paid by the Respondent to the Applicant, will result in a substantial recovery of her reasonable legal expenses. It shall be deducted from the Respondent's share of the Estate, when the time comes, in the event that he does not pay this amount beforehand.

Gabriel, J.