SUPREME COURT OF NOVA SCOTIA
Citation: *Daye v. Daye Estate*, 2024 NSSC 145

Date: 20240513
Docket: 511359
Registry: Halifax

Between:

Heather Denise Daye

Applicant

v.

Estate of Laura Wilhemina Daye, Tina Taylor, Tracey Day

Respondents

DECISION ON COSTS

Judge:	The Honourable Justice John P. Bodurtha
Written Submissions:	December 21, 2023 and January 9, 2024
Counsel:	Jonathan Hooper, for the Applicant Rebecca Hiltz LeBlanc, K.C., and Sarah Douglas, for the Respondents

By the Court:

Background

[1] The Applicant brought an application for an Order enforcing a life interest pursuant to clause 3(c) of the Last Will and Testament of Laura Wilhemina Daye which would allow the Applicant to take up residence in the residential property (the "Property") owned by the Estate. The issue regarding the life interest was appropriately rephrased as: does the life interest contained in clause 3(c) of the Last Will and Testament abate, as a result of the Estate's *de facto* insolvency.

[2] By way of decision, 2023 NSSC 305, I found that the personal representatives of the Estate may sell the Property in order for the Estate to pay its debts and the life interest to the Applicant, Heather Denise Daye, and to the Respondent, Tina Taylor, must abate as a result. I confirmed the authority of the personal representatives to sell the Property so as to allow the Estate to pay its debts.

[3] This matter was initiated in the Probate Court of Nova Scotia and proceeded in a manner consistent with an Application in Court. A Motion for Directions was held, as were two days of discovery examinations of the parties. Affidavits of the personal representatives and of the other "*Persons Interested in the Estate*", as defined by the *Probate Act*, S.N.S. 2000, c. 31 were prepared and filed, as was an Affidavit of the Applicant, which contained extensive exhibits. Pre-hearing briefs and Reply briefs were filed. The matter was heard over the course of two full days with extensive cross-examination of each of the three parties.

[4] The Applicant's application was dismissed with costs. If the parties were unable to agree to costs, I would accept written submissions within 30 days from the date of this decision. The parties have been unable to agree on costs.

[5] On December 21, 2023, the Respondents filed their respective costs submissions. The Applicant filed her response on January 9, 2024.

[6] My decision regarding costs follows.

Issue

[7] What is the appropriate amount of costs to be awarded by this Honourable Court?

Costs Jurisdiction

Costs in Estate Litigation

[8] Section 92 of the *Probate Act*, *supra*, provides for costs in contested probate matters. It states:

> 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.
>
> (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.

[9] However, as stated at paragraph 10 of *Baird Estate (Re)*, 2014 NSSC 444, and in *Scott v. Smith Estate*, 2015 NSSC 298, at paragraph 22, cited with authority in *Leslie Estate v. Gough*, 2021 NSSC 121, "Section 92(1) of the *Probate Act*, *supra*, does not limit the Court's discretion to deal with costs pursuant to Civil Procedure Rule 77".

Applicable Civil Procedure Rules

[10] Costs awards are guided by Rule 77 of the Nova Scotia Civil Procedure Rules. Rules 77.01(1)(a) and 77.03(3) make it clear that the successful party in the litigation is presumptively entitled to its costs.

[11] Rule 77.02(1) reads:

> 77.02(1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> …

[12] Rule 77.06(1) reads:

> 77.06(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.

[13] Rule 77.07 provides factors which are relevant to increasing tariff costs:

> Increasing or decreasing tariff amount
>
> 77.07 (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;
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> (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
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> (c) an offer of contribution;
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> (d) a payment into court;
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> (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.

[14] Rule 77.10(1) provides that "[a]n award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award."

[15] It is also open to the court to award lump sum costs instead of tariff costs: Rule 77.08.

Analysis

Legal Fees

[16] A costs award should represent "a substantial contribution toward a party's reasonable legal fees and expenses but should not amount to complete indemnity.": *Lyle v. Myer*, 2019 NSSC 387, at para. 23; *Shea v. Bowser*, 2012 NSSC 10, at para. 18.

[17] There used to be a general rule in estate litigation that all costs were paid out of the estate, with personal representatives reimbursed on a solicitor-client basis and other parties on a party and party basis. This traditional approach "has been replaced by a more modern approach which aims to discourage unnecessary proceedings and preserve estates for the beneficiaries.": *Leslie Estate v. Gough*, 2021 NSSC 121, at para. 16, quoting from *Sweeney v. Sweeney*, 2020 NSSC 340, at para. 16.

Calculation of Tariff Costs Against the Plaintiff

[18] The Applicant initiated this proceeding in her capacity as a beneficiary of a specific gift, namely a co-life interest in the family homestead. The determination of the issue had no bearing on the residue of the Estate. The question before the Court was limited to an interest in the real property of the Estate, relegating the Applicant to the category of beneficiaries entitled to a specific gift and not that of a residuary beneficiary, for the purposes of this litigation.

[19] The principles engaged in the development of the modern approach to costs and its application are well explained in *Scott v. Smith Estate*, *supra*. I am in agreement with Justice Muise's analysis and will quote extensively from the decision beginning with paragraph 24:

> [24] The most recent pronouncement from our Court of Appeal on costs in estate matters is *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79. In that case, at paragraphs 91 and 93 to 95, the Court stated:
>
> > [91] In *Prevost Estate v. Prevost Estate*, 2013 NSCA 20, this Court observed:
> >
> > > [17] It is often the case that parties in an estate dispute are awarded costs out of the estate. An adverse party may receive party-and-party costs; an executor or trustee will usually receive solicitor-client costs by way of indemnity. One cannot assume judicial generosity in all of these cases. Much will turn on whether

> or not the contested issue arises from conduct of the deceased. Generally, if the need for resort to the court was caused by the testator, costs will be borne by her estate, (*MacDonell, Sheard and Hull Probate Practice*, 4th ed. (Scarborough, Ont: Carswell, 1996) pp. 372-381). However, courts are not always so indulgent with respect to costs on appeal (*Re: Fleck*, (1924) 55 O.L.R. 441 (Ont. C.A.); *Re: Stuart, Johnson v. Williams*, [1990] All E.R. 80 (C.A.); *McDougald Estate v. Gooderham*, 2005 CanLII 21097 (ON CA), [2005] 199 O.A.C. 203 at para 89; *Patrick v. Telus Communications Inc.*, 2008 BCCA 246 at para 43; and for a helpful overview: *St. Onge Estate v. Breau*, 2009 NBCA 36, at para 52-77).

Also see: *Casavechia v. Noseworthy*, 2015 NSCA 56 at para. 62 and following.

….

> [93] A helpful review of costs in estate litigation can be found in Ian M. Hull's article, "*Costs in Estate Litigation*", (1998) 18 E.T.R. (2d) 218. From the case law he extracts two general principles:
>
> > In estate litigation, however, the Canadian and English courts have traditionally exercised their discretion by departing from the usual cost rule whereby the unsuccessful party pays the costs of the successful party.
> >
> > Instead, it would seem to be the general practice of the courts in estate litigation is to consider and apply two principles. First, where the difficulty, conflicts or ambiguities which give rise to the litigation are either in whole or in part, the fault of the testatrix or the fault of those parties interested in the residue, the courts have ordered the parties' costs to be paid out of the estate. Second, there is a public interest in ensuring that wills are valid and that the needs of the deceased's dependents are properly provided for. Accordingly, as the provisions of a will must be properly interpreted and applied its validity or invalidity determined with some degree of predictability, the courts seem to have relieved the unsuccessful parties to the litigation from paying the costs of the successful party.

[20] I find that neither principle is applicable here. The dispute giving rise to the litigation was not the fault of the Testatrix nor does it touch upon any interests in the residue. There was no question demanding a response in the public interest. Neither the validity of the Will nor the provisions contained within it were disputed, nor was the Testatrix's capacity challenged.

[21] This was an application to determine whether the specific gift of a life interest must abate in favour of the Estate's creditors.

[22] Muise, J. continues at paragraph 24 referencing the Hull article as follows:

> [24] …
>
> > [94] Mr. Hull grounds this statement of competing principles on the 19th century decision of Sir J.P. Wilde in *Mitchell v. Gard*, (1863), 164 E.R. 1280 at 1281. After stating the principle that litigation caused by the testator or the residuary beneficiary should be borne by the estate, the court went on to say:
> >
> > > But if the testator be not in fault, and those benefited by the will are not to blame, to whom is the litigation to be attributed? In the litigation entertained by other Courts, this question is in general easily solved by the presumption that the losing party must indeed be in the wrong, and, if in the wrong, the cause of a needless contest. But other considerations arise in this Court. It is the function of this Court to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial inquiry is in a manner forced upon it. Those who are instrumental in bringing about and subserving this inquiry are not wholly in the wrong, even if they do not succeed. And so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs, if chargeable with no other blame, than that of having failed a suit which was justified by good and sufficient grounds for doubt.
> > >
> > > There is still a further class of cases. I speak of those in which, beyond the execution of the will and the capacity of the testator, the opposing party takes upon himself to question the conduct or good faith of others and to place on the record pleas of undue influence or fraud. These are affirmative charges; they ought not to be made except upon apparently very sufficient ground. But though they may and do differ largely in the degree of probability or suspicion to be demanded for their justification, it is not easy to say that they differ in nature from pleas denying execution or capacity. Both classes of defence are addressed to the same question, what was the will of the testator, and both are within the scope of the subject entrusted to the vigilance of the Court. Here, also, it seems just and meet, if the circumstances of the case have rendered the inquiry a proper one, that neither party should be condemned in cost.
> >
> > 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.
>
> [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".

[23] There is no public interest criterion at issue in the present litigation that could give rise to the mitigation of the usual costs rule that the loser pays the winner. Rather, it was clear from the litigation that the dispute for adjudication was a self-serving one whereby the Applicant simply did not want the Property sold to satisfy creditors even though there was no other option. I find that this was an attempt by the Applicant to control the administration of the Estate rather than a *bone fide* attempt to advance a legitimate question relating to the Estate, as discussed in *Mitchell* referenced in *Scott v. Smith Estate, supra.*

[24] The actions of the Applicant should not be rewarded by an order that costs be borne by the Estate. For instance, the Applicant's refusal to accept the veracity of the evidence regarding the Estate's financial position presented to her in advance of trial and exhibited to her own Affidavit, along with the Applicant's accusations against others of mismanagement.

[25] The Court in *Scott v. Smith Estate, supra*, elaborated on the factors to be considered in an assessment of costs, beginning at para. 25:

> [25] At paragraph 96, the Court in *Wittenberg* noted that "the increasing primacy of the usual rule" is expressed in *McDougald Estate v. Gooderham*, 2005 CanLii 21091 (On CA), [2005] O.J. No. 2432 (Ont. C.A.). The Court in *Wittenberg* cites paragraphs 80 and 85 of *Gooderham*. Paragraphs 78 and 79 of *Gooderham* are also instructive. Those four paragraphs state the following:
>
> > [78] The practice of the English courts, in estate litigation, is to order the costs of all parties to be paid out of the estate where the litigation arose as a result of the actions of the testator, or those with an interest in the

> residue of the estate, or where the litigation was reasonably necessary to ensure the proper administration of the estate. See Mitchell v. Gard (1863), 3 Sw. & Tr. 275, 164 E.R. 1280 and Spiers v. English, [1907] P. 122. Public policy considerations underlie this approach: it is important that courts give effect to valid wills that reflect the intention of competent testators. Where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator, it seems appropriate that the testator, through his or her estate, bear the costs of their resolution. If there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will, it is again in the public interest that such questions be resolved without cost to those questioning the will's validity.
>
> [79] Traditionally, Canadian courts of first instance have followed the approach of the English courts. While the principle was that costs of all parties were ordered payable out of the estate if the dispute arose from an ambiguity or omission in the testator's will or other conduct of the testator, or there were reasonable grounds upon which to question the will's validity, such cost awards became virtually automatic.
>
> [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 recognizes the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognizes 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."

[26] The Estate submits that this is a case where the "modern approach" is appropriately applied. I agree. When the within litigation is "carefully scrutinized" it is apparent that no "public policy consideration" as set out above, or at all, was offered up for adjudication. This was unwarranted litigation serving only to deplete the Estate. The question is whether the burden of these litigation costs is an appropriate one for all residuary beneficiaries to bear. Justice Muise continued in *Scott v. Smith Estate, supra*:

> [26] The Court in *Wittenberg* at paragraphs 98 to 100, 103 and 104, stated:

[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.

….

[103] Solicitor and client costs may even be awarded against a party asserting undue influence: *Holzel* citing *Oldfield*.

[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.
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> 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".

[27] In the case at bar the personal representatives were undertaking their duties entirely appropriately. They discovered financial issues faced by the Estate and sought legal advice on how best to remedy the debts. The personal representatives made every effort to keep the Estate out of the dispute with the Applicant by providing her with all requested financial information so she could understand the situation and agree with the only remedy available to the Estate was to sell the Property.

[28] It would be patently unfair to have the residuary beneficiaries bear the costs of this litigation. This litigation was unnecessary. It was the Applicant's inflexibility that prolonged the dispute and required the parties to prepare for and attend a hearing. The Applicant had no reasonable basis for the litigation. She advanced unfounded, uncorroborated, and serious allegations against the Estate and its representatives, and the earlier attorneys under the Power of Attorney, that required the Estate to become involved in this litigation.

[29] The Court in *Scott v. Smith Estate*, *supra*, addressed the issue of baseless allegations:

> [27] At paragraph 107, the Court noted that the Appellant had made "serious allegations of undue influence for which there was literally no factual foundation". Based on that, in addition to his lack of success and the Court concluding that he should not have appealed, the Court ordered him to pay, personally, an increased costs award to the executrix for the estate.

[30] In the case before me, the Applicant was aware of the extreme financial position of the Estate. She knew or ought to have known that she would not be successful in her bid to compel the personal representatives to give her the life interest in the Property. The Applicant has not convinced me why I should pass the litigation costs along to her siblings, the other residuary beneficiaries of this Estate, against whom these allegations were made. The Applicant had no reasonable prospect of success based on the allegations she advanced in her application.

[31] On the issue of reasonable prospect of success and related case law, the Court in *Scott v. Smith Estate*, *supra*, wrote as follows:

> [39] One example is *Barrieau Estate (Re)*, 2008 NSSC 162. In that case, application was made for proof in solemn form of a 1994 will. The deceased had prepared a will in 2004. However, her physician clearly stated that she was not competent to direct and execute the 2004 will. Only one of the multiple beneficiaries under the 2004 will contested the application. The Court found that his objection was frivolous and vexatious such that it would be inappropriate to allow his costs to be paid from the estate. He was also ordered to pay costs to the applicant.
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> [40] Another example is *Van Kippersluis v. Van Kippersluis Estate*, 2011 NSSC 399. At paragraphs 39 to 44, the Court concluded as follows:
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> > [39] It was not reasonable to continue with the *Proof Application* after the Estate had provided the pre-hearing disclosure, and the applicant learned (or should have learned) the evidence of witnesses that he intended to call to proof his allegations. It was not reasonable to decline the offer to interview or discover the lawyer. This hearing should not have occurred. Even if it was reasonable to decline the offer to interview or discover Mr. Gordon, by the end of the first day (after Mr. Gordon's evidence), the applicant clearly had no prospect of succeeding. Instead the hearing was extended beyond the scheduled four days.
> >
> > [40] It would be entirely unfair to the beneficiaries of the Estate to reward the applicant for not taking the opportunity to interview or discover Mr. Gordon and for persisting in a hearing that was extended far too long and for which there was no real benefit other than as a form of discovery in respect of the outstanding *TFMA Application*.
> >
> > [41] It would be unfair to award the applicant costs of this application against the Estate.
> >
> > …
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> [41] In *Wittenberg*, the deceased's son had brought an application to set aside the most recent will on the basis of lack of capacity and undue influence. There were signs of dementia and evidence of a head injury, however, the medical evidence was such that the Applicant failed to establish lack of capacity. There was absolutely no basis for the allegation of undue influence. To the contrary, the Court of first instance found that it was the Applicant himself who had exerted such influence on the deceased during her lifetime to convince her to sell property to him at less than 1/3 of its value. The Court of Appeal indicated that it at least ought to have been clear to him that he had no chance of success on the appeal and probably should have withdrawn the original application after pre-hearing disclosure. On that basis, it ordered him to pay costs, personally, to the executrix on behalf of the estate.

[32] The personal representatives have conducted themselves and this litigation in a manner consistent with the reasonable expectations of a personal representative acting reasonably in the circumstances. The personal representatives made every effort to advance only the arguments that would bring about the swiftest resolution to this proceeding. They acted to avoid unnecessary costs, yet were forced to respond to the Applicant's claims, only serving to run up expenses borne by the Estate.

[33] Generally speaking and in terms of the advancement of the interests of the Estate, these proceedings were entirely unnecessary. The Estate was forced to expend considerable time and financial resources responding to the Applicant's claims and gathering evidence and information to refute the personal allegations advanced against the personal representatives and the former attorneys under the Power of Attorney, all residual beneficiaries. The Applicant was unsuccessful in her litigation. None of the areas of relief sought were awarded. As a result, the Applicant's costs should not be paid out of the Estate.

[34] The Applicant should not be permitted to shift the Estate's costs onto the other residuary beneficiaries of the Estate. I find that the Applicant should be held responsible for the Estate's costs because allowing the Estate's costs to be paid from the residue, as opposed to the Applicant's share of the residue would push the burden of these unnecessary litigation costs onto all of the residuary beneficiaries. This would be unfair and inappropriate.

Tariff Amounts

[35] Pursuant to Rule 77.06(1), the award must, unless the Court orders otherwise, be fixed in accordance with the benchmarks for costs awards set out in the Tariffs.

[36] The Respondents submit that using a modest assessment value for the Property arrived at through discussions with qualified realtors, they suggest a value of $487,500 is appropriate. Applying Tariff "A" provides for a "basic scale" costs award of $34,750 for an "amount involved" of $300,000 - $500,000. In addition, the sum of $2,000 per day should be added to the Tariff amount for each day of hearing required.

[37] Based on the foregoing, the Respondents submit that a costs award in the amount of $38,500 is appropriate in the circumstances, to be made payable, in part or in whole, from the Applicant's share of the residue of the Estate.

Disbursements

[38] The Respondents also claim the sum of $243.05 in disbursements. This amount is comprised of the following:

> $218.05 in filing fee; and
>
> $25 law stamp fee.

Conclusion

[39] In *Armoyan v. Armoyan*, 2013 NSCA 136, Fichaud, J.A. wrote: “The Court's overall mandate, under Rule 77.02(1), is to "do justice between the parties"” (para. 10). The Court retains a broad discretion to fulfill that mandate but subject, of course, to the overriding requirement of acting judicially and in a principled manner. As Fichaud, J.A. explained in *Armoyan*, the Tariffs are presumptively applicable, due to their predictability:

> [17] The Tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case where circumstances conform generally to the parameters assumed by the tariffs. The remaining discretion is a mechanism for construction adjustment that tailors the tariffs’ model to the features of the case.

[40] In determining an amount involved under Tariff A, I am unable to accept the Respondents’ valuation which apparently was based on discussions with qualified realtors. None of that evidence was before me in either the form of an expert report or *viva voce* evidence. Given that I have no reliable evidence before me as to the value of the Property, I find this an appropriate case to use the Tariffs for guidance and award a lump sum in accordance with Rule 77.08.

[41] I find that the Applicant was aware of the Estate’s precarious financial position because she had been provided with the necessary financial information to understand that the Estate’s debts outvalued its liquid assets. Therefore, she ought to have understood the untenable position of the personal representatives. Instead, and as was supported by her own *viva voce* evidence on cross-examination, the Applicant refused to accept the explanations offered by the personal representatives, she refused to accept the veracity of the letters provided by the deceased’s banking institutions and she proceeded with the litigation.

[42] The Applicant proceeded in this fashion at her own risk. The other residuary beneficiaries should not be made to pay for the Applicant's decision to initiate this litigation and her decision to carry it on to a hearing thus depleting the Estate.

[43] Based on the foregoing law and analysis, I find that the Respondents ought to be paid their costs out of the Applicant's share of the residue, with the balance of their legal fees to be paid out of the Estate. The Applicant's costs shall be borne by her personally.

[44] I award lump sum costs to the Respondents in the amount of $32,000.

[45] I am satisfied that this award will do justice between the parties. I ask that counsel for the Respondents prepare the form of Order.

Bodurtha, J.