SUPREME COURT OF NOVA SCOTIA
Citation: *Thurber v. Thurber Estate*, 2025 NSSC 273

Date: 20250820
Docket: *Dig*, No. 516491
Registry: Digby

Between:

Tony Thurber, Tess Thurber and Thor Thurber

Applicants

v.

Laurie Anne Thurber as Personal representative of the Estate of Clifton Warren Thurber Jr.

Defendants

Judge:	The Honourable Justice Muise
Written Submissions:	January 10, 2025
Counsel:	Richard W. Norman, for the Applicants Benjamin P. Carver, Jeffrey D. Waugh & Robbie S. Mason for the Defendants

By the Court:

COSTS DECISION

[1] In *Thurber v. Thurber Estate*, 2024 NSSC 264, I dismissed the Applicants' application for a proprietary estoppel order and a variation of their late father's will under the *Testators' Family Maintenance Act*, RSNS 1989, c. 465 ("*TFMA*"). The parties were unable to agree on costs and filed written submissions on the issue.

[2] The Respondent seeks an order requiring the Applicants to pay her lump sum costs totalling $172,000, inclusive of disbursements, based on that which follows. Her position is that Tariff A costs of $134, 289, plus disbursements, will not provide substantial indemnity considering her adjusted base legal fees of $198, 740. The amount requested will cover about 80% of her fees attributable to the Application. Such a lump sum is justified because exceptional legal services were required in the circumstances and the Applicants waiting until the first day of hearing to confirm they were dropping their resulting trust claim added unnecessarily to her legal expenses.

[3] The Applicants' position is that costs, including theirs, may properly be paid out of the Estate as the Application involved a dependants' relief claim. However, they propose that each party should bear their own costs and submit the caselaw indicates this is not an appropriate case in which to require them to pay costs even though they are the unsuccessful party.

The caselaw the Applicants rely upon in support of their submissions regarding costs in dependants' relief claims and the impropriety of requiring them to pay costs in the circumstances of the case at hand includes:

1. *Wittenberg v. Wittenberg Estate*, 2015 NSCA 79;
2. *St. Onge Estate v. Breau*, 2009 NBCA 36;
3. *McAuley v. Genaille*, 2017 MBCA 69; and,
4. *Re Foote Estate*, 2012 ABQB 197.

I will address whether these cases support the Applicants submissions below.

[4] The Applicants argue, in the alternative, that: the Respondent "over-lawyered"; the costs requested are not reasonable in the circumstances; the presumption that Tariff A applies has not been rebutted; and the "amount involved" was $1,000,000, not the $1,973,678 submitted by the Respondent. They

add that the delay in withdrawing the resulting trust claim was due to the Respondent's failure to provide adequate evidence on the issue at her discovery examination.

[5] Both parties agree the general rule is that costs follow the event, unless the case fits within one of the recognized exceptions to the rule. The Respondent takes the position that none of the exceptions apply in the case at hand. The Applicants take the position that the fact they were advancing a reasonable and non-frivolous dependants' relief claim brings into play the exception that applies when the litigation is caused by a fault on the part of the testator.

[6] In the case at hand, there was no issue regarding the interpretation of the will. It left everything to the Respondent, who is the deceased's widow, since she survived him and he had left the Schedule A list of specific personal property gifts blank. The alleged "fault" of the testator was to not have provided for the Applicants, who are three of his four children from his first marriage, unless the Respondent predeceased him.

[7] I agree with the Applicants, and with paragraph 24 of *Re Foote Estate*, to the extent that dependants' relief claims can fit within the "fault of the testator" category of exceptions. In determining whether the *TFMA* claim in the case at hand fits within that category of exceptions, it is informative to look at the rationale for such exceptions and the competing interests at play.

[8] As noted at paragraphs 57 and 58 of *St. Onge Estate* and at paragraphs 96 to 100 of *Wittenberg Estate*, the approach to costs in estate matters ought not, on the one hand, foster or induce unmeritorious claims or impose the cost of litigation on the residual beneficiaries if they and the testator are not the cause of the litigation, nor, on the other hand, deter reasonable challenges to wills by "making the costs of opposing them depend on successful opposition", as it is in the public interest to review doubtful wills.

[9] Rather, as noted at paragraph 100 of *Wittenberg Estate*, where "there is an unsuccessful party who is the cause of the litigation, it is proper that the unsuccessful party bear much of the burden".

[10] The circumstances in the dependants' relief cases referred to by the Applicants were very different from those in the case at hand.

[11] In *McAuley*, the father of a minor child, who was also the child of the deceased, brought a dependants' relief application on his own behalf and on behalf of the deceased's child. The deceased had been paying child support for the child. The Public Guardian and Trustee ("PGT") had to take carriage of the claim on behalf of the child to eliminate the conflict of interest. The only provision in the will for that child was the residue and, after distribution of the primary asset, i.e. superannuation funds, to the deceased's mother, and payment of estate debts, there was no residue. The application judge found the child to be in financial need and ordered the executor to pay certain amounts for the benefit of the child. The appeal court concluded there was insufficient evidence to establish financial need because the father of the child had not disclosed nor provided evidence of his financial circumstances. It overturned the order requiring payment of amounts for the child except for a portion which the executor conceded ought to be paid for the child. The executor had been prepared throughout to ensure that the child was reasonably provided for. It was the father's "obstinate unwillingness to provide any meaningful financial information that made it impossible for settlement to be achieved". The PGT was awarded party and party costs from the estate, despite being largely unsuccessful, as its involvement was made necessary by the position advanced by the father and his creation of a conflict of interest. The father was not entitled to costs.

[12] In *Re Foote Estate*, the deceased's will left the vast majority of his $120,000,000 estate to two charities, which had already received millions of dollars, during the deceased's lifetime, and which would also share over $100,000,000 US in a charitable foundation established by the deceased. The will left only a tiny fraction of the estate to the deceased's widow and children. The will further included a "poison pill" provision which purported to disinherit any beneficiary who challenged it. There was a question regarding the deceased's domicile and thus the applicable law. The deceased's widow and five of his six children wished to get a ruling on whether the "poison pill" provision was enforceable. First, they needed a determination on domicile to establish the proper jurisdiction. They argued unsuccessfully that it was Alberta. The executor and charities argued successfully that it was Australia. However, the court refused to order the widow and children to pay the costs of the executor or the charities. The charities had to bear their own costs as their position was consistent with that of the executor, such that they were effectively acting as intervenors even though they were protecting their inheritance. The court concluded the case fell within the recognized exceptions to the general rule that costs follow the event, such that the

applicants were entitled to have their costs paid from the estate, for the following reasons:

1. the deceased caused the litigation by creating issues of domicile and the enforceability of the "poison pill" provision, as well as by preferring charities over family;
2. it was clearly arguable in Alberta that the "poison pill" provision was contrary to public policy;
3. it was reasonable for the family to bring the application to determine the extent of their jeopardy in bringing a family relief application;
4. they were successful in establishing that Alberta was a legitimate forum to determine jurisdiction and to interpret the wills; and,
5. there were reasonable arguments to be made that the deceased was domiciled in Australia, Alberta or British Columbia.

[13] Both *McAuley* and *Re Foote Estate* involved circumstances created by the testator or testatrix warranting a dependants' relief application. In both cases, the deceased had overwhelmingly favoured beneficiaries to which they had no legal obligation, over beneficiaries to which they had a legal and moral obligation. In *Re Foote Estate*, the size and nature of the estate easily permitted assets to be distributed to adequately and fairly provide for all "dependants". In *McCauley*, though the size of the estate was not as great, it was largely made up of superannuation funds. Therefore, it could easily have been divided. As such, those were dependants' relief cases which fit in the "fault of the executor" exception.

[14] In the case at hand, the deceased left everything to his spouse of about a quarter of a century. She had helped run his lobster business and care for the blended family. She had fished her own lobster boat until she became permanently disabled from doing so and had to find easier work. She was left responsible for caring for an adult child of hers and the deceased who, due to mental health issues, was unable to fully care for himself. The deceased's primary legal and moral obligations were to her. The only asset in the estate was the deceased's lobster business. The bulk of its value was the lobster licence. It was important to all that the licence be kept in the family, if possible. As such, the Estate Assets were not easily divisible. The Applicants were all independent and self-supporting adults. At least Thor Thurber and Tony Thurber would, more likely than not, continued benefitting from the lobster business, Thor by eventually being able to purchase the business at a discounted price, and both of them by continuing to be employed in

the business in the meantime. As things stood before the Application was brought, the Applicants could also expect to inherit from the Respondent's estate when she ultimately would pass. Obviously, the Application changed the relationship the Applicants had with the Respondent.

[15] If Thor had brought the same type of unmeritorious proprietary estoppel claim against the deceased, while he was still alive, to force the transfer of the lobster licence to him for free, that would also, more likely than not, have similarly changed his relationship with his father.

[16] To find that a testator, by preparing such a will, in circumstances such as those in the case at hand, has created an exception to the general rule that costs follow the event, would serve as an inducement for any person fitting the definition of dependant in the *TFMA* to bring a claim any time a will left everything to the deceased's spouse, as they would have their legal expenses paid from the estate and not bear any costs risks. That would run contrary to the purpose of avoiding such inducements. Considering how common it is for wills to leave everything, or almost everything, to a surviving spouse, it would also risk opening floodgates.

[17] There may be circumstances in which preparing a will leaving everything to one's spouse would constitute a "fault" of the testator. One example is where a will leaves everything to a second spouse, when the second marriage is of short duration, the first marriage was of long duration, the second spouse has not contributed anything to acquire or maintain the estate assets, they have no relationship with the children of the first marriage, and they acquire significant assets by right of survivorship, such as in *R.(J.) v. M.(J.D.)*, 2016 BCSC 2265. The case at hand does not even approach such circumstances.

[18] There was no "fault" in the deceased preparing his will as he did. It was clearly reasonable given his legal and moral obligations. There was nothing "doubtful" about his will. Rather, it was the Applicants' fixation on the belief that the deceased had promised to transfer his lobster licence to Thor for free that was the cause of the litigation.

[19] For these reasons, I cannot find that the *TFMA* claim in the case at hand fits within the "fault of the testator exception".

[20] In the event I am wrong in concluding that the circumstances described make it such that this case does not fit within the "fault of the testator exception", I

find those same circumstances made it unreasonable for the Applicants to pursue the *TFMA* claim.

[21] In addition, the Applicants advanced a proprietary estoppel claim which was not based on any testamentary instrument or testamentary act of the deceased. It was based on an alleged promise by the deceased. It had no chance of success even if the evidence of the Applicants had been accepted in its entirety. That claim clearly would not fit within this or any other exception from the general costs rule.

[22] Consequently, the general rule that costs follow the event applies.

[23] That leaves the question of what quantum of costs will do justice between the parties.

[24] I agree with the Applicants that there is a presumption that Tariff A applies and, since the resulting trust claim was dropped, the amount involved is in the $750,001 to $1,000,000 range, which encompasses the value of the lobster fishing licence which, itself, makes up the bulk of the Estate.

[25] Also, as noted by the Applicants, a decision to award lump sum costs cannot be based simply on starting with the successful party's actual legal expenses and determining whether tariff costs provide substantial contribution towards those expenses, and a decision to depart from tariff costs must be made on a principled basis: *Homburg v. Stichting Autoriteit Financiele Markten*, 2017 NSSC 52, paras 9 to 11; and, *International Royalty Corporation v. Newmont Canada Corporation*, 2023 NSSC 181, paras 25 and 31.

[26] As noted in *Layton v Layton*, 2022 NSSC 60, at paragraph 18(e), citing *Armoyan v. Armoyan*, 2013 NSCA 136:

> [T]here will … be rare circumstances in which the Tariff does not generate a just cost award. Extraneous factors may serve to increase the cost of litigation to such a degree that the assumptions embedded within Tariff A begin to unravel. For example, the underlying legal issues may be of such importance or are otherwise exceedingly complex that the effort (and related costs) associated with litigation becomes disproportionate to the actual financial "amounts involved". Alternatively, a party's misconduct may have been so egregious as to significantly and improperly increase the cost of litigation. When this occurs, the Court does not stubbornly adhere to the Tariff and artificially inflate the "amount involved" to somehow conjure a more appropriate cost award. Rather, when this occurs, the subjectivity required to make Tariff A work:

> … exceeds a critical level, [and] the tariff may be more distracting than useful. Then, it is more it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the Rules or case law."

[27] As I indicated at paragraph 6 of *Sandra Richards v. Robert Richards et al*., 2013 NSSC 269, and at paragraph 23 of *3021386 Nova Scotia Ltd. v. Barrington (Municipality)*, 2014 NSSC 313, based on paragraphs 20, 21, 24 and 25 of *Armour Group Ltd. v. Halifax (Regional Municipality)*, 2008 NSSC 123:

> "The ... judge ought not depart from Tariff ... costs unless there are special circumstances requiring a sufficient level of exceptional legal services. Examples of such special circumstances include the following: 1) complexity; 2) public interest; 3) pre-chambers process; 4) unsettled questions of law; 5) conduct or misconduct of a party and/or solicitor; 6) failing to use an alternative and less costly process to determine the dispute; 7) the need for additional counsel; 8) the presence of multiple counsel, unless the additional counsel have limited participation; and, 9) the presence of expert witnesses. The 'level of exceptional services required' as a result of one or more of these, or other applicable circumstances, provides the grounds for whether the ... judge should exercise his or her discretion to depart from Tariff [costs], and to what degree."

[28] The case was of some significance for the Respondent as the Applicants sought to divest her of the lobster licence, representing the largest part of the lobster business she acquired under the deceased's will. However, she had acquired homes and real property by right of survivorship and had received the proceeds of the sale of her lobster business at full market value. She was still working. She also planned to sell the one she inherited to Thor at significantly less than market value in any event. So, she was not solely relying on the full value of the inherited lobster business for her livelihood and ultimate retirement prospects.

[29] There was substantial evidence on family, business, retirement and succession planning history, as well as reciprocal actuaries who provided expert evidence regarding future expenses and income. However, the examinations of the two actuaries were fairly brief, and the procedures and legal issues were not so "exceedingly complex that the effort (and related costs) associated with the litigation" needed to become "disproportionate to the actual financial 'amounts involved'". There were no "unsettled questions of law". The law was relatively straightforward. Realistically, the risk of the Respondent losing much of her inheritance was quite low. The argument advanced by the Respondent during the hearing revealed a recognition that the Applicants' proprietary estoppel claim had essentially no chance of success and their *TFMA* claim had a very poor chance of

success and, even if partially successful, could not justify granting the lobster licence or anywhere near its full value.

[30] I agree with the Applicants that the case did not call for the Respondent to have three lawyers representing her throughout the entire hearing. The Respondent argues, based on *Freeman v. Ponhook Lodge*, 2024 NSSC 1, that parties can choose the lawyers they want to represent them and that their legal expenses are not necessarily unreasonable just because they are higher than those of the other party or they have more lawyers, because, among other things, an issue may be more important to one party than to the other.

[31] In the case at hand, the family lobster licence was as important to the Applicants as it was to the Respondent.

[32] More importantly, in *Ponhook*, it was determined that lump sum costs were warranted because of the lack of "amount involved" and the remaining issue was what were the reasonable legal expenses against which to measure substantial contribution. In the case at hand, there is a clear "amount involved" and I must assess whether the circumstances are sufficiently special to warrant a lump sum costs award, before I get to determining what would constitute a substantial contribution towards reasonable legal expenses.

[33] The Respondent's law firm provided evidence that the Respondent agreed to have three lawyers represent her at the hearing because: Mr. Carver was initially retained; Ms. Mason had worked on the file as an articled clerk, then as a junior lawyer, and helped with taxation issues, given her experience and interest in tax law; then, Mr. Waugh was brought on because of his litigation experience. The fact the Respondent agreed to being represented by three lawyers does not make it such that the circumstances reasonably called for three lawyers. If Mr. Waugh was brought on for his litigation experience, he could have conducted the hearing following consultation with Mr. Carver who is knowledgeable in estate matters. That did not occur. In fact, Mr. Waugh did not even conduct most of the cross-examinations. They were spread out amongst the three lawyers. That is somewhat inconsistent with the purpose of having Mr. Waugh join the team for his litigation experience. The relevant factors and tests were relatively straightforward and did not change as the matter progressed. Since Ms. Mason was very junior, her experience in tax law was not so significant as to require her presence throughout the hearing. She could similarly have been used as a resource through consultation. In addition, taxation issues related to the asset in dispute were of lesser importance

as the deceased's lifetime capital gains exemption had already been used as part of a deemed disposition on death, which resulted in an adjusted cost base for the lobster licence of $820,000. Many of the taxation questions explored by Ms. Mason during the hearing added little to the case.

[34] The Applicants did wait until the first day of hearing to confirm they were not proceeding with their resulting trust claim. However, that misconduct was not "so egregious as to significantly and improperly increase the cost of litigation" to the point of justifying, by itself, or with other factors, deviation from Tariff A. I will nevertheless address later whether it, by itself or with other factors, justifies adding an amount to Tariff A costs.

[35] In light of these points, I cannot find that the circumstances of this case resulted in a need for a "level of exceptional services" that would warrant circumventing Tariff A and awarding lump sum costs.

[36] Using the basic scale in Tariff A, and an amount involved of $1,000,000, produces base costs of $64,750. Adding $2,000 per day for the 3 days of hearing produces a total Tariff A costs award of $70,750.

[37] The judge may also "add an amount to, or subtract an amount from, tariff costs", to account for relevant factors, one example being "conduct of a party affecting the … expense of the proceeding": *Rule 77.07*. "Frequently this is done to sanction or reward the conduct of the parties": *Day v. Valade*, 2017 NSSC 242, para 12. A factor that is not listed as an example, but which has been found to justify adding to tariff costs in an application in court, is where a party was required to expend substantial effort in preparing voluminous affidavits: *Tapics v. Dalhousie*, 2018 NSSC 265, para 19.

[38] The Applicants submit it did not become apparent to them that their resulting trust claim should be withdrawn until October 2023. They indicate they withdrew that claim in the prehearing brief they filed November 24, 2023. However, that brief was silent on the resulting trust issue. It did not make argument in support of it, but it also did not state that the claim was being withdrawn. During a prehearing conference on January 2, 2024, the Respondent asked the Applicants to confirm whether they were withdrawing their resulting trust claim. They advised they would do so after the prehearing conference. No such confirmation was provided. It was only on the first day of the hearing that the Applicants confirmed they were not pursuing the resulting trust claim. As a result, the Respondent had to expend legal resources preparing to respond to the resulting trust claim that had

been pled, in case it was advanced at the hearing. Those expenses turned out to be a waste of resources created by the Applicants' failure to advise they were abandoning their resulting trust claim. That amounted to litigation conduct by the Applicants which unnecessarily increased the expense of the proceeding for the Respondent. It caused her to have gather information and prepare evidence related to the purchase, operation and sale of her lobster fishing business, as well as how the proceeds thereof were to be and were handled. It also required research and preparation for questioning and argument related to the resulting trust issue.

[39] The affidavit evidence prepared for the Respondent's case was about five times as voluminous as that prepared for the Applicants' case even though it was less repetitive. The Applicants' evidence needed only focus on their personal financial circumstances, family history and limited relevant discussions with their late father. The Respondent's evidence needed to address: her personal financial circumstances, which were much more complex than that of the Applicants; their interplay with the needs of her adult son who is not completely independent; medical evidence related to her disability; family history; more extensive discussions with her late husband; past lobster business purchase and sale transactions; details of her contributions to the deceased's lobster business; current lobster business operations; accounting information related to business and personal affairs; as well as tax, retirement and succession planning discussions. Especially considering the breadth of the information which had to be presented, the affidavit evidence submitted by the Respondent was remarkably succinct, focused and well organized. In addition, the cross-examinations conducted on behalf of the Respondent were generally more surgical than those conducted on behalf of the Applicants. The cost of this increased efficiency was, more likely than not, greater preparation time.

[40] These points would perhaps provide some explanation for why the Respondent's legal fees greatly exceeded those of the Applicants. However, we do not have details of what the Applicants' legal fees were based on to make a proper comparison. For instance, the lack of success may have caused their lawyer to significantly reduce his fees. In any event, despite the difference in legal fees having been highlighted by the Applicants, it is unnecessary to make the comparison.

[41] Both the Applicants and the Respondent had to: obtain an actuarial report, which included providing their actuary with all relevant information; consult with

their actuary; and prepare to cross-examine the opposing party's actuary. This added complexity and preparation time to the case.

[42] It is not clear how much time was devoted to the resulting trust issue after October 2023, as it would have been part of the global preparations for evidence, examination and ultimate argument. However, preparing the Respondent's voluminous affidavit and the affidavit of the accountant, as well as dealing with the expert evidence of the actuaries, would have required a significant amount of time and effort, including to sort out large amounts of information and records and organize them so that they could be efficiently presented.

[43] Considering these points, adding $15,000 in costs, to account for the time wasted on the resulting trust issue and for the extra preparation time expended, would appear to be fair and just in the circumstances.

[44] That results in a total costs award of $85,750. I find this amount will do justice between the parties.

[45] "Necessary and reasonable disbursements" are also to be included in a costs award: *Rule 77.07*.

[46] The Respondent's disbursements total $13,083, including $3,967 paid to her actuary, and inclusive of HST. I note that a portion of the disbursements is for travel to, and accommodation in, Annapolis Royal for the hearing. That portion, with HST, totals $2,415. Such travel and accommodation expenses for out-of-town counsel are only properly included as a disbursement to be paid by the unsuccessful party where local counsel was not reasonably available or "for some other good and valid reason, the retention of local counsel would not be appropriate": *Wall v. Haney*, 2007 NSSC 153, para 17. There has not been any evidence, or even representation, to establish that it would not have been appropriate for the Respondent to retain local counsel. Therefore, it has not been shown that these travel and accommodation expenses were reasonable and necessary disbursements. Consequently, they will be disallowed.

[47] Deducting that disallowed amount from the total disbursements claimed leaves a balance $10,668 as being necessary and reasonable.

[48] The Applicants are of moderate means. Therefore, it will take them some time to procure the funds needed to pay costs and disbursements.

[49] For the foregoing reasons, I order the Applicants to, within 90 days, pay the Respondent $85,750 in costs, plus $10,668 in disbursements inclusive of HST.

[50] I ask counsel for the Respondent to prepare the order.

Muise, J.