IN THE COURT OF PROBATE FOR NOVA SCOTIA
Citation: Casavechia Estate (Re), 2014 NSSC 142

Date: 20140424
Docket: Hfx No. 418956
Probate Court File No. H-60181
Registry: Halifax

In the Estate of Louis Joseph William Casavechia
also known as William John Casavechia, Deceased

DECISION on COSTS

Judge: The Honourable Justice Glen G. McDougall

Written Submissions
On Costs: March 28, 2014

Counsel: Richard Niedermayer, Ll.B.
Helen L. Foote, Ll.B.
Wayne Francis, Ll.B.

By the Court (G.G. McDougall, J.):

[1] An Application for Proof in Solemn Form of a handwritten letter of Louis Joseph William Casavechia dated November 14, 2010 was heard by me on November 14, 2013.

[2] By written decision released on February 25, 2014 I granted the application finding that the letter demonstrated the testamentary intention of the deceased and compliance with section 6, sub-section (2) of the *Wills Act*, RSNS 1989, c. 505, as amended.

[3] The proponent of the letter as a valid holograph codicil is Shannon Noseworthy, a biological daughter of the deceased testator. Her application was opposed by the testator's surviving spouse, Glenna Casavechia (step-mother to the applicant), and her son and daughter from a previous relationship (both of whom had been adopted by William Casavechia) and two grandchildren. The main impetus for the opposition to the application came from Mrs. Glenna Casavechia. The corporate executor – The Bank of Nova Scotia Trust Company – took no position other than to decline Shannon Noseworthy's invitation to have the letter's validity as a testamentary instrument judicially determined.

POSITION OF THE PARTIES

[4] Counsel for the applicant Shannon Noseworthy is seeking costs on a solicitor/client basis for his client. In his written submission on costs he suggests:

> If the executor had brought the Application, as it had an obligation to do and was invited to do, there would be no reason to deviate from the usual practice of awarding its costs form the estate on a solicitor client basis. In this situation, where the task of proving the document fell to a beneficiary, with a consequent increase in her legal costs, it is respectfully submitted that it is appropriate to treat her costs in the same way that the executor's costs would have been treated if it had assumed the burden of bring the Application.

[5] Counsel for Glenna Casavechia, while foregoing a claim for costs for her own client, suggests that the Court should award costs in accordance with Tariff C of the *Costs and Fees Act* plus any disbursements that might be approved by the Court.

[6] The range for an application lasting more than an hour but less than one-half day under Tariff C is $750.00 to $1,000.00.

POSITION OF THE PERSONAL REPRESENTATIVE

[7] The Proctor for the Estate, on behalf of the Estate's Representative, recommends an award of $1,000.00 under Tariff C plus provable disbursements for Ms. Noseworthy.

[8] In the event that Mrs. Casavechia is seeking costs, the Estate's Representative recommends an award of $750.00, also under Tariff C. In doing so, counsel noted that "... Ms. Casavechia was also taking a self-interested position, one that would preserve the lot in question as part of the overall property of the Testator. She is entitled to the Estate residue under Clause 3(h) of the Will."

COURT'S RULING

[9] It is readily apparent that the serious issue of deciding whether the Testator's letter demonstrated a testamentary intention was made more contentious by feelings of animosity between his biological progeny and his second wife and her children from a previous relationship. This is a sad reality but one that is not unique to this fractured family.

[10] This, however, does not change the approach the Court must take in deciding what the appropriate award of costs should be.

[11] In **Veinot v. Veinot Estate** (1998), 167 N.S.R (2d) 101 (affirmed on appeal at 172 N.S.R. (2d) 111), Goodfellow, J. stated the following:

> 18 It is noted that the guidance of C.P.R. 63.12(1) is contained in Part I of the rules dealing with party and party costs. The court has long recognized the representative in an estate/fund has a duty to such estate or fund and the duty often requires the engagement of a solicitor. The representative should upon acting reasonably, have such solicitor's fees recovered on a solicitor/client basis from the fund. The practice has been to grant solicitor and client fees payable out of the estate/fund. Such should be taxed, (C.P.R. 63.24).
>
> 19 No such solicitor/client relationship exists with the estate by claimants who have entered into their own solicitor/client relationship which places them initially

> at least in no different position than any other party to litigation who engages his/her own solicitor and is responsible for such solicitor's fees in accordance with the individual terms of their retainer. At one time there was a tendency to look to the estate for all fees on a solicitor/client basis but no such automatic policy has been mandated by the Civil Procedure Rules. There is a clear trend to allow only the solicitor for the representative party solicitor/client fees, unless the claimants can establish circumstances warranting the exercise of discretion for granting them solicitor and client costs.
>
> 20 In my view there is no justification for starting at any other point than a possible discretionary award of party and party costs to a claimant for which payment may be directed out of the estate/fund.
>
> 21 If solicitor and client costs are warranted then such must be justified. There must be exceptional circumstances to warrant the exercise of discretion in any proceeding by awarding a claimant solicitor and client costs.

[12] I do not see any reason to award costs on any other basis than party and party. While there appears to be a heightened level of friction between the parties to this application there was no reprehensible conduct that could persuade the Court to award solicitor/client costs. Even if there was such conduct I would likely not order the Estate to pay the increased costs. I would likely have ordered any additional costs to be paid by one or other of the two principal protagonists while ordering the Estate to pay party and party costs based on Tariff C.

[13] In deciding the appropriate amount to award, the ***Civil Procedure Rules*** allow a judge to:

> ... add an amount to, or subtract an amount from, tariff costs. (See ***CPRule*** 77.07(1))

[14] Although the length of time needed to hear the application did not exceed one-half day, it did require the filing of significant affidavit evidence and rather comprehensive pre-hearing briefs of counsel.

[15] It is obvious that counsel were required to dedicate considerable time and effort to properly prepare for the hearing.

[16] In order to "... do justice between the parties" (See ***CPRule*** 77.02(1)) the Tariff C range of $750.00 to $1,000.00 does not adequately help to compensate the

successful party. The guidelines under Tariff C allow a judge to "... award costs that are just and appropriate in the circumstances of the application."

[17] I will therefore award the applicant, Shannon Noseworthy, costs of $2,000.00 payable out of Estate assets at the time of closing. I am also prepared to order reimbursement to her of any reasonable disbursements incurred in advancing the application. If the amount for disbursements cannot be agreed to by counsel, a listing of all disbursements being claimed can be presented to me for approval.

[18] I will leave it to counsel to prepare the Order reflecting this decision on costs.

McDougall, J.